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Editorial Note

MNLU Corporate and Competition Law Review

I am delighted to introduce the Maharashtra National Law University Aurangabad- Corporate and Competition Law Review the first law journal of the University. We have received research articles, case comments from more than 170+ person including from outside the country. It is consists of different themes of contemporary relevance on Corporate and Competition. The present volume deals with topics relating to A. Mitigation of Damages Under the United Nations Convention on Contracts for the International Sale of Goods (UN CISG). B. Competition Commission of India: Saving it by Urgent Reforms. C. Coal India Ltd. V GOCL & Ors. D. Conflict in Global Currency Issues. E. The Intellectual Property Rights and Competition Law: A Comparative Analysis (2015). F. Ease of doing Business and Public Private Partnership Projects in India. G. Competition Regulations and Corporate Governance. H. Issues and Challenges Pertaining to Executive Compensation. I. An Analysis of the Relationship between Company Performance and Independent Directors. J. IBC-A Game Changing Law for Corporate Insolvency. K. Uniqueness of Class Action Suites in India: Reason from Indian Perspective. L. Demystifying the Benami Law: The Favoured Position and the Challenged. M. Safeguarding the Breach Of Duty By Directors: An analysis of the business judgment rule in India. N. Leniency Program and its effects on Indian Market. O. Securities Fraud- Issues and challenges for Regulators in India.

I would like to thank Dr. S. Surya Prakash, Vice-Chancellor of DAMODARAM SANJIVAYYA NATIONAL LAW UNIVERSITY, VISAKHAPATNAM to provide me this opportunity. I congratulate all the members of the editorial team. I also express gratitude and sincere thanks to our Advisory Panel for their support and guidance. Last and but not the least I express my heartfelt thanks to all authors to repose confidence on MNLU, Aurangabad for bringing this publication to contribute in the subject to Corporate and Competition Law. This first volume of CCLR is a initiative of MNLU-A Family members I thank one and all for their support.

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MITIGATION OF DAMAGES UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (UN CISG)

~ Dr. MOHAMMED ZAHEERUDDIN*

ABSTRACT:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If the party invoking the breach of contract fails to take such reasonable measures, the party in breach may request for a reduction in damages in the amount in which the loss should have been mitigated. As such, failure to take reasonable measures does not result in the injured party's liability to pay damages but the injured party cannot recover the damages for the loss, which could have been avoided. The type of mitigation measures adopted by the party claiming damages must be reasonable in the circumstances of the case.

KEYWORDS:

Seller, buyer, mitigation of damages, UN CISG, UNIDROIT Principles.

1. INTRODUCTION:

The United Nations Convention on contracts for International Sale of Goods (UN CISG), 1980 applicable to contracts for the international sale of goods. The Convention imposes certain obligations on the seller[1] and buyer.[2] If there is any breach of obligations imposed under the contract or the Convention, the CISG provides different remedies to the aggrieved parties, including claiming of damages under articles 74-77. Articles 45 (1)(b) and 61 (1)(b) provide that the aggrieved buyer and the seller, respectively, may recover damages as provided in articles 74 to 77 "if the other party fails to perform as required by the contract or this Convention."[3]

The claim of damages under CISG is subject to certain conditions provided in sections 74-77. According to article 74, the damages for breach of contract by one party consist of a sum equal to the loss suffered by the other party as a consequence of the breach. Article 75 provides that if a contract is avoided and made a substituted transaction, a party may recover the difference between the contract price and the price in the substitute transaction. According to article 76, if there is no substituted transaction, a party may recover the difference between the price fixed by the contract and the current price at the time of avoidance of contract. The damages payable under articles 75 & 76 are in addition to recovery of damages under Article 74. Article 74 deals with general rule for measuring damages.

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[1] Articles 30 to 44 of CISG.

[2] Articles 53 to 60 of CISG.

[3] UNCITRAL Digest of case law on United Nations Convention on Contracts for the International Sale of Goods, (2016), page 331, available athttp://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf.

The damages recoverable under articles 74, 75 & 76 are liable to be reduced if it is established that the aggrieved party failed to mitigate these damages as required by article 77. The reduction is the amount by which the loss should have been mitigated.[4] Article 77 applies to all cases of liability to pay damages for breach of contract.[5] If an aggrieved party does not request damages, whether by way of an affirmative claim or by way of set-off, article 77 does not apply. The injured party's failure to mitigate loss within the meaning of article 77 does not prevent him from asserting other remedies.[6]

The principle that a party must mitigate loss that reasonably can be avoided is generally recognized in domestic laws, but is expressed in different way and is applied with varying degrees of emphasis.[7] The mitigation of damages rule is also found in the UNIDROIT Principles of International Commercial Contracts, 2016. According to the UNIDROIT Principles, the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.[8]

The UN CISG specifically provides that a party must mitigate the loss that can be reasonably avoided and a party who fails to take such reasonable measures to mitigate the loss cannot recover damages for the loss, which could have been avoided.[9] The object of this paper is to examine the scope of article 77 of the UN CISG that deals with mitigation of damages, with the help of decided case law. There is no duty on the injured party to mitigate the damages, however, if the injured party claims damages, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

2. MITIGATION OF DAMAGES UNDER ARTICLE 77 OF CISG:

The CISG contains in article 77 a mitigation rule requiring a party relying upon a breach of contract to take such measures as are reasonable to mitigate the loss, including loss profit. A failure to satisfy this requirement permits the party in breach to claim a reduction in his damages liability.[10] Article 77 requires an aggrieved party claiming damages to take reasonable steps to mitigate losses; if he fails to do so, the breaching party may claim a reduction in the damages recoverable in the amount by which the loss should have been mitigated.[11] This provision is based on the principle that there should be no compensation for avoidable loss.[12]

The first part of article 77 of CISG provides that a party who relies on breach of contract must take reasonable measures to mitigate the damages from the breach. The second part of article 77 states that if the party claiming damages for breach fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. Because the first sentence of article 77 is worded in terms of a duty to

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[4] UNCITRAL Digest, *supra* note 3, at 331.

[5] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2d ed. 2005), Oxford University Press, at 788.

[6] *Id,* at 788.

[7] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (4th ed. 2009), Kluwer Law International, the Netherlands, page 592.

[8] Article 7.4.8.

[9] Article 77.

[10] MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS LAW AND PRACTICE (2d ed. 2007), Oxford University Press, page 595.

[11] UNCITRAL Digest, *supra* note 3, at 356.

[12] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 787.

mitigate, courts may require such mitigation, and allow a set-off in favor of the breaching party for failure of the non-breaching party to mitigate.[13]

The aim of article 77 is to encourage mitigation of loss. To this end, measures directed at mitigating the loss are to be taken as soon as the party to the contract could foresee the danger of breach of the contract by the other party and of his potential loss.[14] Strictly speaking, a party to a CISG contract who is (or may be) injured by breach is not 'obligated' to mitigate loss. However, under article 77, a party who fails to take reasonable measures to mitigate cannot recover damages for the loss which could have been mitigated.[15] Failure to take such a measure does not result in the injured party's liability to pay damages, but precludes of any loss which could have been prevented.[16] Non-compliance with article 77 will entail the loss by the injured party of the right to claim those damages, which could have been avoided.[17] Article 77 does not state at what point in a legal proceeding the issue of mitigation must be considered by a court or tribunal.[18]

The obligation to mitigate damages is only considered if the debtor raises it as a defense since it requires the creditor to demand damages.[19] In *CLOUT case No. 424* (*Roofing material case)*,[20] the court held that the mitigation of damages does not have to be addressed because the buyer did not request specific damages during the proceedings, neither by way of set-off nor as a counterclaim.[21]

2.1. DUTY TO MITIGATE THE LOSS:

Article 77 CISG establishes the duty to mitigate the loss. This is not however a duty in the sense that the party who claims damages will himself be liable for breach of contract if he fails to mitigate.[22] What the obligation to mitigate damages entails depends on the circumstances in the particular case, that means, it depends on the conduct of a reasonable person in the shoes of the creditor who has a damage claim. The obligation stated in article 77 is to be interpreted taking into account the competing interests of the parties, as well as commercial customs and the principle of good faith. In this regard, trade usages and practices

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[13] Eric C. Schneider, *Measuring damages under the CISG: Article 74 of the UN Convention on Contracts for the International Sale of Goods*, 9 PACE INT'L L. REV. 223 (1997).

[14] Victor Knapp, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 543, Cesare Massimo Bianca & Michael Joachim Bonnell eds., 1987, *qtd.,in*Djakhongir Saidov, *Methods of limiting damages under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. 307 (2002).

[15] JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG (4th ed. 2012), Kluwer Law International, the Netherlands, page 129.

[16] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 788.

[17] Djakhongir Saidov, *Methods of limiting damages under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. 307 (2002).

[18] Journal of Law & Commerce, *Part Three: Sale of goods: Section II of Part III, Chapter V Damages (Articles 74-77): Article 77*, 30 J.L. & COM. 368 (2012).

[19] PETER SCHELECHRTIEM& PETRA BUTLER, UN LAW ON INTERNATIONAL SALES, THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2009) Springer, page 221.

[20] ObersterGerichtshof (Supreme Court), Austria, 9 March 2000, translation available at: http://cisgw3.law.pace.edu/cases/000309a3.html.

[21] Journal of Law & Commerce, *supra* note 18.

[22] PETER HUBER & ALASTAIR MULLIS, THE CISG, A NEW TEXT BOOK FOR STUDENTS AND PRACTITIONERS, (200&) Sellier, European Law publishers, page 289.

(Article 9) as well as special habits which exist between the parties have to be taken into account.[23]

The obligation to mitigate damages exists not only when a loss has already occurred, but even before the loss arises.[24] Especially the obligation to mitigate can mean for the creditor to have to make a timely cover purchase or to repair a defect before the defect can cause consequential damage to other property of the creditor.[25] Where, however, the cover purchase is meant to take the place of the seller's delivery, the situation is more complicated because here the duty to make a cover purchase as a mitigation measure would effectively mean that the buyer is forced to avoid the contract. The starting point should be that the buyer should not be forced to abandon his right to claim performance too quickly. He may therefore insist on performance for a certain time.[26] The Austrian Appellate court Graz in *Excavator Case*,[27] held that article 77 does not constitute an actual duty against others but a mere obligation for oneself to mitigate damages if relying on a breach of contract.

The party in breach want to reduction in damages, it should submit the details of facts to show that the other party in breach of duty to mitigate the damages. In *CLOUT case No. 176* (*Propane case)*,[28] the plaintiff (buyer) and defendant (seller) entered into contract for the delivery of propane gas. The seller claimed that the buyer had committed a breach of duty to mitigate damages, however, he has not advanced any detailed facts that the buyer has breached its duty to mitigate damages. The court held that article 77 requires the sellers to put forward detailed facts and the supporting evidence showing why the buyer has breached its duty to mitigate damages, the possibilities of alternative conduct and which part of the damages would have been prevented by this alternative conduct.

A party is not required to take mitigation measures as long as the contract exists between the parties. In *CLOUT case No. 361* (*Frozen meat case)*,[29] the seller demanded for advance payment for delivery of deer meat (venison), the buyer did not pay, however, argued that the seller had refused to perform the contract with regard to place of performance. The seller sued for damages for non-performance against the buyer. The higher regional court ruled that if the buyer is obliged under the contract to pay the price in advance, then the seller is under no obligation to offer to deliver the goods before having received the price. The court also found that article 77 in principle does not impose an obligation on the party seeking to rely on the breach of contract to mitigate losses arising from a failed contract of sale by means of a substitute purchase as long as the contract still exists. The court observed that article 77 does not principally oblige a party to enter a substitute transaction. It is only in exceptional circumstances that the seller is obliged to rescind its primary rights to performance for secondary rights in the form of damages.

2.2. MEASURES MUST BE REASONABLE IN THE CIRCUMSTANCES:

[23] PETER SCHELECHRTIEM& PETRA BUTLER, *supra* note 19, at 221.

[24] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 788.

[25] PETER SCHELECHRTIEM& PETRA BUTLER, *supra* note 19, at 221.

[26] PETER HUBER & ALASTAIR MULLIS, *supra* note 22, at 290.

[27] Appellate Court Graz, Austria 24 January 2002, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/020124a3.html.

[28] ObersterGerichtshof (Supreme Court), Austria, 6 February 1996, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/960206a3.html.

[29] Braunschweig(Appellate Court), Germany 28 October 1999, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/991028g1.html.

Loss resulting from a breach of contract, including loss of profit, is not to be compensated to the extent that it could have been reduced by taking reasonable measures.[30] According to article 77, measures to mitigate loss must be reasonable in the circumstances concerned. The type of measures that need to be undertaken depends on the criterion of reasonableness.[31] Article 77 only requires the party entitled to compensation to take those reasonable measures to mitigateloss that could be expected under the circumstances from a party acting in good faith.[32]

The mitigation measures should be such as are reasonable in the circumstances of the particular case. The standard for the reasonableness criterion is that of a prudent businessperson in the position of the party claiming damages.[33] The injured party is not obliged to undertake measures which involve extraordinary, unreasonable costs.[34] It is submitted that regard should be had on the one hand to the amount of the damage that could arise if nothing were done and on the other hand to the question which party is in a better position to take measures to mitigate.[35]

All that is required is that the party claiming damages take reasonable measures to avoid the loss. What is reasonable will of course vary from case to case and in that sense, care should be taken in articulating general rules.[36] The aggrieved party is not obligated to take measures that, in the circumstances concerned, are "excessive" and entail unreasonably high expenses and risks. An aggrieved party can refrain from such measures and still comply with article 77.[37]

An aggrieved party is not obligated to mitigate in the period before the contract is avoided (i.e. at a time when each party may still require the other to perform).[38] Article 77 may oblige the party affected to threatened by a breach to make a substitute transaction in order to prevent or mitigate loss.[39] Measures to preserve the goods and to sell perishable goods may also be required under article 77, even where there is no contractual duty to take such measures under articles 85 to 88.[40]

In *CLOUT Case no. 176* (*Propane case*),[41] the Supreme Court of Austria explained the scope of reasonable measures. It held that examples of such reasonable measures to mitigate the loss would be those, which under the circumstances of the individual case could have been expected in good faith. In the court's view, the answer to the question of which measures would be reasonable and ought to be taken depends on how a reasonable creditor would have acted in the same situation.

In *CLOUT case No. 130* (*Shoes case*),[42] the buyer (defendant) ordered for winter shoes from the seller (plaintiff) and the seller demanded for buyer to furnish security. When

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[30] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 787.
[31] Djakhongir Saidov, *supra* note 18.
[32] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 790.
[33] PETER HUBER & ALASTAIR MULLIS, *supra* note 23, at 290.
[34] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 787.
[35] PETER HUBER & ALASTAIR MULLIS, *supra* note 22, at 290.
[36] *Id.* at 290.
[37] Djakhongir Saidov, *supra* note 17.
[38] Journal of Law & Commerce, *supra* note 18.
[39] Arbitral Tribunal Vienna, 15 June 1994 CISG-online 120, RIW 1995, 590, 591.
[40] PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 790.
[41] Supreme Court of Austria, 6 February 1996, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/960206a3.html.
[42] Appellate Court Düsseldorf, Germany 14 January 1994, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/940114g1.html.

the buyer neither paid nor furnished the security, the seller avoided the contract, resold the shoes, after two months of avoiding the contract, to other retailer and demanded compensation breach of contract. The buyer accepted responsibility in general but disputed the extent of damages which it attributed to the seller's failure to resell the shoes in a reasonable manner. The appellate court held that the seller had performed the resale in a reasonable time noting that the seller was not obliged to resell the shoes before the date of avoidance. In the court's view, a resale nearly 2 months after avoidance (avoidance on 7 August, resale on 6 and 15 October) still succeeded within reasonable time and was no breach of the seller's obligation under article 77 to mitigate the loss.

In *CLOUT Case no. 723,*[43] the seller sued the buyer for payment of T-shirts purchase price. The buyer argued for set off purchase price against claims for damages due to non-conformity. The buyer faced from its customer with the alternatives of accepting a reduction in price or taking back the T-shirts altogether, the buyer accepted a price reduction. The court held that the buyer met its obligation and complied with its duty towards seller under article 77 to take reasonable measures to mitigate the loss resulting from breach of contract by accepting a reduction of the purchase price instead of accepting the goods back in all from its customers.

In *CLOUT Case no. 746,(Construction equipment case),*[44]a German company (seller/plaintiff) sold three pieces of construction equipment to the Austrian company (buyer/defendant), to be picked up at construction site. The buyer took delivery of only one of them and avoided the contract. The seller sold the equipment and claimed the difference price as damages. The appellate court held that seller had by virtue of their substitute sale, clearly performed his duty under article 77 in particular because no more favorable sale could have been concluded in the specific circumstances.

In *CLOUT Case no. 681(Vitamin C case),*[45]a German company (buyer/claimant), entered into a contract with a Chinese company (seller/respondent), for the purchase of Vitamin C. At the request of buyer, the shipping date was extended but the seller requested a higher price. The buyer rejected the seller's request, the seller subsequently did not deliver the goods on the specified date. The buyer avoided the contract, made the substitute purchase; the substitute purchase price was higher than the original contract price and sought damages before arbitral tribunal. The seller argued that the buyer failed to mitigate the loss within a reasonable time, stating that the date in issue should be when it requested a price increase for its performance. The seller further alleged that the buyer did not make the cover transaction in a reasonable manner, since it used two intermediary companies and did not buy directly from China, but Hong Kong. The CIETAC arbitral tribunal noted that the buyer's substitute transaction was made in a timely manner, since the decisive date was the declaration of avoidance by the buyer, and not the seller's request for a higher price. The use of and purchase from the Hong Kong intermediate was reasonable from the then current situation.

2.3. REIMBURSEMENT OF MITIGATION EXPENSES:

The party affected by the breach of contract can claim damages under article 74 for expenses incurred that are necessary under article 77 to prevent or mitigate losses.[46] In

[43] Appellate Court Koblenz, Germany 19 October 2006, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/061019g2.html.

[44]Oberlandesgericht (Appellate Court) Graz, Austria 29 July 2004, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/040729a3.html.

[45] CIETAC Arbitration proceedings, China 18 August 1997, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/970818c1.html.

[46]PETER SCHLECHTRIEM& INGEBORG SCHWENZER, *supra* note 5, at 792.

CLOUT case No. 886 (*Sizing machine case*),[47] it was held that the cost of taking reasonable steps to mitigate damages may be claimed as part of the aggrieved party's damages claim under article 74. There is no need of separate proceedings to decide the issue of mitigation of damages. In *CLOUT case No. 271 (Vine Wax case)*,[48] the court inquired whether mitigation of damages should be reserved for separate proceedings or should be decided at the time of determining damages. The court stated that article 77 establishes a defense that may exclude a claim and must be considered *sua sponte* (on its own).

2.4. MITIGATION NOTICE TO THE OTHER PARTY:

Article 77 does not explicitly require an aggrieved party to notify the other party of proposed steps to mitigate losses.[49] However, the steps taken by the aggrieved party should be reasonable in the circumstances.

In *CLOUT Case No. 343* (*Video recorders case*),[50] the court held that the buyer should have given notice of mitigation steps to the seller, the buyer's failure to give information of intended mitigation steps to the seller, denied the damages to the aggrieved party (buyer). The Swiss buyer (defendant) complained about defects of the goods (video recorders), the seller delivered instructions booklet in German language instead of Swiss official languages, causing considerable expenditure for the production of such manuals. The German seller (plaintiff) sued for purchase price. The District Court Darmstadt held that seller entitle for its claim, the buyer had lost her rights since she failed to give notice regarding the missing instruction booklets. The court also stated that if the buyer were entitled to the booklets, he should have informed the seller. The buyer by ordering the production of the manuals elsewhere instead of requesting delivery from the seller, violated its obligation to mitigate damages under article 77.

3. MITIGATION OF DAMAGES BY THE BUYER:

If the buyer is relying on breach of contract, he is required to mitigate the damages. If the seller claims for reduction in damages, the buyer is required to show the mitigation measures adopted by him, otherwise, the court may reduce the damages to the extent that could have been avoided. The following case law shows the successful mitigation measures adopted by the buyer.

In *CLOUT case No. 277* (*Iron molybdenum case)*,[51] the seller (defendant) failed to deliver iron-molybdenum to the buyer (plaintiff), the buyer concluded a substituted contact with a third party and sued the seller for the difference between the price paid and the price under the contract. The court held that the buyer was entitled to damages under article 75. In respect of duty to mitigate damages by the buyer, it took the buyer only two weeks to conclude the cover purchase and the seller has not sufficiently demonstrated that a cheaper cover purchase would have been possible within this period of time. The court also held that buyer was not obliged to refrain from a cover purchase merely because of the high market price.

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[47] Commercial Court St. Gallen, Switzerland, 3 December 2002, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/021203s1.html.

[48] Bundesgerichtshof (Supreme Court), Germany, 24 March 1999, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/990324g1.html.

[49] UNCITRAL Digest, *supra* note 3, at 358.

[50] Landgericht Darmstadt (District Court), Germany, 9 May 2000, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/000509g1.html.

[51] Oberlandesgericht (Appellate Court) Hamburg, Germany, 28 February 1997, English translation available at: http://cisgw3.law.pace.edu/cases/970228g1.html.

In *CLOUT case No. 311* (*Tannery machines case)*,[52] the seller (plaintiff) failed to return the tannery machines to the buyer (defendant) as on agreed period of time. The buyer contracted a third party for treating its leather goods and sought for expenses related to mitigation of damages. The court ruled that article 74 included also the buyer's reasonable expenses to mitigate the loss, as it was forced to contract a third party due to the seller's failure to return the machines within the agreed period of time.

In *Delchi Carrier v. Rotorex*,[53]Rotorex (USA) agreed to sell 10,800 compressors, in three shipments to Delchi (Italy), according to the sample sent to Delchi. The seller made the first shipment and when second shipment was en route, the Delchi discovered that compressors delivered by the first shipment were non-conforming. The buyer rejected the second shipment, stored the delivered goods and expedited the shipment of previously ordered Sanyo compressors. The Rotorex failed to cure the defected, therefore, Delchi sued Rotorex for damages. The court held that once Delchi's attempts to remedy the nonconformity failed, it was entitled to expedite shipment of previously ordered Sanyo compressors to mitigate its damages. Indeed, UN CISG requires such mitigation. The court also held that Rotorex is liable to pay damages for: (i) lost profits resulting from a diminished sales level of Ariele units, (ii) expenses that Delchi incurred in attempting to remedy the nonconformity of the compressors, (iii) the cost of expediting shipment of previously ordered Sanyo compressors after Delchi rejected the Rotorex compressors, and (iv) costs of handling and storing the rejected compressors. The appellate court affirmed the award of damages and reversed in part the denial of incidental and consequential damages.[54]

In *ICC Arbitration Award in Case No. 8786 of January 1997* (*Clothing case*),[55] the respondent clothing retailer (buyer) placed a number of orders with the claimant clothing manufacturer (seller). The seller sent new samples to buyer's sub-agent, and advised that it could not deliver the goods on time, the buyer requested for reduction of price and commitment for delivery of goods on time. When neither was happened, the sub-agent of the buyer cancelled the order due to seller's fundamental breach. The buyer sued for damages. The Arbitrator deemed that the buyer's claim for loss profits, indirect loss of profits, travel costs and design expenses were reasonable. The seller had argued that the buyer was not entitled to damages because he failed to take reasonable mitigation measures as required under article 77. The arbitrator rejected this claim and noted that the seller did not offer any evidence which would suffice to hold that the buyer did not take necessary measures to mitigate damages. Thus, there was insufficient evidence that the buyer failed to take measures to mitigate damages and therefore its recovery would not be reduced pursuant to article 77.

In *Printed work case,*[56] the buyer sued the seller for damages for failing to meet a fixed date. The trade broker informed the buyer that there would be delays in delivery due to paper shortage. The buyer cancelled the printing order, awarded the order to another company and demanded compensation, additional costs. The court held that the buyer had

[52]Oberlandesgericht (Appellate Court) Köln, Germany, 8 January 1997, English translation available at: http://cisgw3.law.pace.edu/cases/970108g1.html.

[53] CLOUT case No. 85, U.S. District Court, Northern District of New York, United States, 9 September 1994, available on the internet at: http://cisgw3.law.pace.edu/cases/940909u1.html.

[54] CLOUT case No. 138, U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995, available on the internet at: http://cisgw3.law.pace.edu/cases/951206u1.htm.

[55] Available on the internet at: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/978786i1.html.

[56] District Court, Germany 29 May 2012, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/120529g1.html.

mitigated the damages by awarding a new order to another company; therefore, the buyer did not breach its duty under article 77 to mitigate the loss.

In *Sunflower seed case,*[57] the buyer and seller concluded a contract for the sale of 3,000 tons of sunflower seeds produced in Belgium. The seller refused to perform the contract by the delivery of the agreed quantity, invoking changes in the market and certain other impediments. The buyer made the cover purchase from another supplier at a higher price than the one agreed upon between it and the seller, sued for damages. The seller argued that failure was due to impediments beyond its control. The court rejected the arguments of the seller, since the seller was aware of the circumstances. Further, the court accepted that the buyer observed its obligation under article 77, the buyer acted promptly and adopted reasonable measures by concluding in due time a substitute cover contract.

3.1. IN FOLLOWING CASES, BUYER FAILED TO MITIGATE DAMAGES:

A breaching party may claim a reduction in the damages to be awarded to the aggrieved party in the amount by which reasonable mitigation measures would have reduced the loss to the aggrieved party.[58] If the buyer failed to mitigate the damages, the seller may request for reduction in damages.

In *CLOUT case No. 1029* (*Brassier cups case*),[59] the contract is for supply of linings to be sued in the manufacture of swimsuits. The buyer cancelled the orders, obtained replacement goods and sued the seller for damages. The seller who does not contest the quantity of the faulty goods, submits that the buyer, who could have avoided incurring part of the damage by stopping the manufacturing process earlier, has not taken reasonable measures to mitigate the loss in the sense of article 77. The Court of Appeal held that after making its complaint about the lack of conformity, the buyer had taken three days to stop the swimsuit production chain, thus contravening, in the court's view, his obligation to minimize the damage under article 77.

In *CLOUT Case No. 977 (PTA case)*,[60] the contract is for the sale of certain chemicals (PTA) for the resale by the buyer. After resale by the buyer, the buyer's customers informed that the packages was less than the contracted weight. Hence, the buyer claimed damages from the seller. The seller argued that it was not liable for any damages as the buyer failed to mitigate the damages. The tribunal found that the seller fundamentally breached the contract and article 35. It also held that since the buyer did not take such steps as were reasonable in the circumstances to mitigate its losses, the seller's liability was limited to what the buyer's loss would have been, had reasonable measures to re measure and repack the goods been taken.The buyer has been negligent when dealing with its domestic customers; the buyer accepted its customers' request to reduce the price or return the goods without negotiating with its domestic customers, or taking remedial measures; the buyer did not perform its duty to mitigate the loss stipulated in article 77, so it should be liable for the enlarged loss.

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[57] Court of Appeals of Lamia, Greece, Decision 63/2006, available on the internet at: http://cisgw3.law.pace.edu/cases/060001gr.html.

[58] UNCITRAL Digest, *supra* note 3, at 358.

[59] Courd'appel de Rennes (Court of Appeals), France, 27 May 2008, available on the internet at http://cisgw3.law.pace.edu/cases/080527f1.html.

[60] CIETAC Arbitration proceedings, People's Republic of China, 19 June 2003, available on the internet at: http://cisgw3.law.pace.edu/cases/030619c1.html.

In *CLOUT case No. 318* (*Vacuum cleaners case*),[61] the seller (plaintiff) sued the buyer (defendant) for the outstanding purchase price for the sale of vacuum cleaners. The appellate court found that the seller was entitled to claim the purchase price under article 53 in conjunction with articles 14, 15, 18 of CISG, because the buyer had not been able to return the vacuum cleaners. The court also found that the buyer had failed to mitigate the loss under article 77, as it had made only efforts to effect replacement purchases in its region, without taking into account other suppliers in Germany or abroad. The buyer's submissions are overall incomplete; the court cannot determine the extent of the damages, so that a set-off with a claim for loss of profit is also unjustified for these reasons.

In *CLOUT case No. 271* (*Vine Wax case*),[62] the plaintiff (buyer) purchased wax from the defendant (seller) to use the wax to protect vines from drying out and reduce the risk of infection. The buyer gave a notice of defective wax to the seller and complained of major damage to vines treated with the wax. The Court of First Instance dismissed the claim; the Regional Appeal Court held that there is a cause of action. The seller appealed to the Supreme Court, it held that the Court of Appeals did not deal with the question of buyer's joint responsibility for the damages pursuant to article 77. The Supreme Court set aside the judgment of appellate court and remanded the case back to the appellate court with a note that, as failure to mitigate by one party could lead to the total exclusion of liability of the other party.

In *Watches case*[63], the seller stopped the deliveries of its products to the buyer, after signing an exclusive distribution contract with another Ukrainian retailer. The buyer (Ukraine) sued the seller (Switzerland) for damages for failure to deliver the watches. The court held that when the goods are not delivered, article 77 compels the buyer to purchase replacement goods if it is reasonably possible. The buyer should have mitigated the amount of the damages by buying the watches through the retailer in the Ukraine. If the buyer did not purchase replacement goods and if it would have been reasonable to do so, the damages and interest are reduced to the amount that would be due, if he had purchased the replacement goods.

4. MITIGATION OF DAMAGES BY THE SELLER:

If the seller is relying on breach of contract, he is required to mitigate the damages, otherwise, the buyer may request for reduction in damages to be awarded to the seller. The following case law demonstrates the successful mitigation measures by the seller.

In *CLOUT case No. 886* (*Sizing machine case*),[64] the buyer/plaintiff (Tel Aviv) ordered a textile manufacturing machine from the seller/defendant (Swiss), made an advance payment to the defendant. The plaintiff subsequently became insolvent and could not meet further instalment payments and sought restitution of its advance payments. The seller acknowledged its indebtedness to the buyer but asserted a set-off claim for damages. The court considered whether seller has truly complied with its duty to mitigate the occurrence of any losses and damages as was reasonable in the circumstances. The buyer alleged that the ordered machine could have been entirely re-utilized as a whole or at least via disassembling

[61] Oberlandesgericht (Appellate Court) Celle, Germany, 2 September 1998, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/980902g1.html.

[62] Bundesgerichtshof (Supreme Court), Germany, 24 March 1999, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/990324g1.html.

[63] Supreme Court of Switzerland 17 December 2009, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/091217s1.html.

[64] Commercial Court of St. Gallen, Switzerland, 3 December 2002, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/021203s1.html.

all individual parts. The seller argued that the machine was unique, for this reason, such a machine could not have been further re-sold or re-utilized except to the extent it had already done. The court held that the seller's decision to disassemble was the most reasonable and prudent solution according to the expert's opinion. The steps taken by the seller were the most reasonable, sensible and prudent actions it might have taken in a technical and commercial sense. It concluded that the seller acted principally in compliance with its duty to mitigate the occurrence of losses under these circumstances.

In *CLOUT case No. 130* (*Shoes case*),[65] the seller demanded for buyer to furnish security, when the buyer neither paid nor furnished the security, the seller avoided the contract, resold the shoes, after two months of avoiding the contract, to other retailer. The court held that there was no breach of the seller's obligation under article 77 to mitigate the loss.

In *Excavator Case*,[66] the seller resold the goods for the same amount that it had acquired the goods itself. There is no evidence that seller passed over an opportunity to sell the excavator for a higher price. The buyer's submission that, according to the report of an expert witness, seller had sold the goods for less than the current price. The court held that even if it was true, cannot forfeit seller's claim for damages under article 77, seller complied with its obligation to mitigate losses under article 77.

4.1. IN FOLLOWING CASES, SELLER FAILED TO MITIGATE DAMAGES:

If the seller failed to take reasonable mitigation measures but relying on breach of contract, the party in breach may claim for reduction in damages. The following case law explains how the seller has failed to mitigate the damages.

In *Fashion goods case*,[67] the court allowed the seller (plaintiff) to recover purchase price and interest. However, it held that seller is not entitled to recover collection costs, by charging a collecting agency seller violated its duty to mitigate loss pursuant to article 77.

In *CLOUT Case No. 395*,[68] the buyer committed a breach of contract by not taking the delivery of goods from the seller. The seller resold the goods and claimed for damages. The court held that the amount had to be reduced on the basis that the seller did not comply with its obligation to mitigate damages under article 77. The seller resold the goods at a price below the price offered by the breaching buyer when the latter sought unsuccessfully to amend the contract.[69]

In *CLOUT Case No. 2087*,[70] buyer refused payment of the invoices of the seller due to several contractual breaches by the seller. The seller organized a resale of the goods after six months. The Court agrees with the buyer that the seller is bound to organize the resale

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[65] Appellate Court Düsseldorf, Germany 14 January 1994, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/940114g1.html.

[66] Appellate Court Graz, 24 January 2002, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/020124a3.html.

[67] District Court Düsseldorf, Germany, 25 August 1994 English translation available on the internet at: http://cisgw3.law.pace.edu/cases/940825g1.html.

[68] Supreme Court of Spain 28 January 2000 (*Internationale Jute Maatschappij v. Marín Palomares)*, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/000128s4.html.

[69] UNCITRAL Digest, *supra* note 3, at 357.

[70] Appellate Court Antwerp, Belgium, 24 April 2006 (*GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International*), English translation available on the internet at: http://cisgw3.law.pace.edu/cases/060424b1.html.

within a short period and that seller has failed to meets its duty to mitigate damages by waiting six months before organizing the resale. The buyer is entitled to a reduction of the damages in the amount by which the loss should have been mitigated under article 77.

In *CLOUT case No. 861 (Aluminium oxide case),*[71]the buyer and seller concluded a contract for the purchase of aluminum oxide in three instalments and the payment was to be made by irrevocable Letters of Credit (L/C). Due to problems with the bank, the first L/C was not issued, the seller resold the goods to another company. The seller went on to purchase aluminum oxide for the second installment. However, the buyer failed again to issue an L/C. The seller resold part of the goods to another company and initiated arbitration proceedings claiming for damages. The tribunal held that seller is entitled for damages; however, the seller was entitled to receive the price difference between the contract price and the substitute transaction only with regard to the first failed installment. In the case of the second failed installment, though the seller was aware that the buyer was not going to fulfil the contract yet it still purchased more material to sell to the buyer. This violated the seller's duty to mitigate the damages under article 77.

5. DISTRIBUTION OF DAMAGES TO BOTH THE PARTIES:

The obligation to mitigate the damages lies on both the parties to the contract. The court may distribute the damages to the buyer and seller, if both are responsible for not taking reasonable measures. The Germany Supreme Court in the *Clay case,*[72] distributed the damages between buyer and seller. In this case, the German seller had delivered ground clay (kaolinite) for the grading of potatoes to buyer who has its business in Netherlands. In 2004, elevated dioxin levels were detected in milk and milk products, on examination of the clay it was found that clay delivered by the seller showed dioxin levels for above the limit admissible in kaolinite clay. The buyer sued the seller for damages. The court found that seller delivered the non-conforming goods and also left the buyer in ignorance of dioxin content known to the seller. The buyer itself failed to take any care with regard to the handling of the clay, which was made use of in animal feed. Hence, both parties committed similarly serious breaches of duty, independently contributing to the damage, which justifies an equal split of damages, which is a question to be decided at this liability phase of the proceedings.

6. MITIGATION OF ATTORNEY FEE:

Article 77 of CISG requires that an aggrieved party to mitigate all kinds of damages. In fulfilling its obligation to mitigate under article 77, a party may incur attorneys' fees, for example, in demanding performance, an attorney may be engaged to write the demand letter.[73]

In *CLOUT Case no. 410* (*Flagstone tiles case*),[74] a German buyer (defendant) ordered through 'X', a self-employed sales agent, flagstones from an Italian seller (plaintiff). The seller sent an invoice. X handed the stones and he reduced the price. The buyer issued cheque in favor of X according to reduced price and it was cashed by X but the seller never

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[71] CIETAC Arbitration proceedings China, 29 September 1997, available on the internet at: http://cisgw3.law.pace.edu/cases/970929c1.html.

[72] Federal Supreme Court Germany, 26 September 2012, English translation available on the internet at http://cisgw3.law.pace.edu/cases/120926g1.html.

[73] John Y. Gotanda, *Awarding damages under the UN Convention on the International Sale of Goods: A matter of Interpretation*, 37 GEO. J. INT'L L. 95 (2005).

[74]Lower Court Alsfeld, Germany 12 May 1995, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/950512g1.html.

received the purchase price, therefore, seller sued the buyer for purchase price and for the expenses of the reminder. The court held that claims of the seller to be justified as X had no representative authority for the seller. Concerning the costs for the reminder, the court dismissed the claim and held that the seller had the possibility to entrust a German advocate with sending the reminder. When entrusting an Italian lawyer the seller failed to take measures to mitigate the loss by virtue to article 77.

7. BURDEN OF PROOF:

A party claiming reduction in damages is required to prove that the other party is failed to take particular mitigation measures. The second sentence of article 77 states that the breaching party may claim a reduction in damages for failure to mitigate losses.[75] The burden of proof for the existence of an obligation to mitigate and its breach including the reasonableness of a possible mitigation measure lies with the debtor.[76] As to mitigation, the rule should be as follows: the party who argues that the injured party has not taken appropriate mitigation measures bears the burden of proving this allegation.[77]

In *CLOUT case No. 318* (*Vacuum cleaners case*),[78] the seller sued the buyer for the outstanding purchase price for the sale of vacuum cleaners. The buyer claimed for set-off with claim for loss of profit, however, the submission are incomplete. The buyer failed to submit which offers for a substitute transaction it obtained and from which companies. The court held that as the buyer's submissions are overall incomplete, the court cannot determine the extent of the damages, so that a set-off with a claim for loss of profit is also unjustified for these reasons.

In ICC Arbitration Case No. 9187 of June 1999 (*Coke case*)[79], the arbitral tribunal has stated that the tribunal should review *ex officio* whether the aggrieved party had complied with the mitigation principle, but that the breaching party had the burden of establishing failure to comply.[80]

In *FCF S.A. v. Adriafil Commerciale S.r.l*,[81] the seller does not indicate the reasonable measures that the buyer should have taken to limit the damage, the seller failed to discharge his burden of proof. The court held that no adjustment to damages will be made if the breaching party fails to indicate what steps the other party should have taken to mitigate.

8. CONCLUSION:

The UN CISG under article 77 expressly requires the parties to mitigate the damages that could have avoided. A party relying upon a breach of contract should take reasonable measures to mitigate the loss. The type of mitigation measures required to take will depend on the circumstances of each case. The aggrieved party is not required to take any excessive measures; it needs to take only reasonable measures. There is no duty on non-breaching party to mitigate the damages, however, if the aggrieved party claims any damages under CISG, the party in breach may argue for reduction in damages to the extent of possible mitigation of loss.

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[75] UNCITRAL Digest, *supra* note 3, at 358.

[76] PETER SCHELECHRTIEM& PETRA BUTLER,*supra* note 19, at 221.

[77] Djakhongir Saidov, *supra* note 17.

[78] Oberlandesgericht (Appellate Court) Celle, Germany, 2 September 1998, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/980902g1.html.

[79] Available on the internet at: http://cisgw3.law.pace.edu/cases/999187i1.html.

[80] UNCITRAL Digest, *supra* note 3, page 358.

[81] Bundesgericht (Supreme Court), Switzerland, 15 September 2000 Supreme Court, 4C.105/2000, English translation available on the internet at: http://cisgw3.law.pace.edu/cases/000915s2.html.

The analysis of the decided case law and scholarly work relating to article 77 suggest that there should be no compensation for avoidable loss under the UN CISG. The party invoking the breach of the contract must adopt the measures that are reasonable, taken care of in the circumstances. Failure to take mitigation measures does not result for any liability to the injured party, if that party is not claiming any damages from the other party. Further, failed to mitigate the damages will not affect the aggrieved party's claim for other remedies under the UN CISG. If the parties to the contract do not want to apply article 77, they may exclude the application of article 77 by their contract.[82]

[82] Article 6.

COMPETITION COMMISSION: SAVING IT BY URGENT REFORMS

~ Dr. Krishan Mahajan & Dr. Yogesh Pratap Singh***

I. Introduction

The Competition Commission of India (CCI) under the Competition Commission Act, 2002 is a vital component of ensuring the achievement of a social order[1] of lesser inequality and minimum human dignity mandated by the Constitution of India as a fundamental principle of governance of the country,[2] regardless of the political party in power. The Indian competition law regime has grown substantially in the last six years ever since the Act became operational in 2009. The recent trend displays that CCI has addressed issues of anti-competitive behavior in real estate, power, media and entertainment, automobiles sector including couple of e-commerce cases where CCI examined online and off-line transactions. Lately, certain retailers raised concerns about practices of online trading portals viz. Amazon, Snapdeal and Flipkart by which they offer vast discounts. In *M/S Jasper Infotech Private Ltd. v. M/S Kaff Appliances (India) Private Ltd*., the CCI while examining practices of online trading portals held that prescription of price by e-commerce companies to its dealers and insistence to follow a pricing regime is in violation of Section 3(4) (e) read with 3(1). Quantitatively, there may not be a substantial increase in cases filed or disposed of in 2014, qualitatively, CCI has addressed a lot of significant issues. However, there have been substantial number of writ petitions challenging orders of the CCI concerning procedural due process and few related to substantive due process, a concept that form the basis of Rule of Law in a democratic and normative constitutional scheme. The design of competition proceedings varies by jurisdiction, but each jurisdiction should

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[1] See Art 38. 1 [(1)] The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

2 [(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.]

[2] Article 37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

aim to ensure due process for companies accused on a violation. The rules of law require no less.

It also appears that CCI faces law and manpower problems that could undermine its statutory duty of ensuring free and fair competition in the use of market power in India. The seven-member body under the Competition Commission of India Act, 2002, which replaced the Monopolies & Restrictive Trade Practices Act, 1969, has now been reduced to a four-member body including the Chairperson of the Commission.

II. Vital Component

The Competition Commission is crucial to achieving the goal of social, economic and political justice enshrined in the Preamble of the Constitution of India. This goal is to be achieved by the kind of use of resources, public[3] or private, as enshrined in the good governance constitutional principles stated in Articles 39 (b)[4] and (c).[5] These essentially state that the resources of India must be used for the common good and to prevent the common detriment through the concentration of wealth and the means of production. It is towards this end that the Commission has been empowered to use the vast repertoire of its powers for ensuring that the public and private market power that economic development generates does not end up in a few controlling the markets to generate profit for them alone. What is to be feared is not only the abuse of market power but also the power to abuse. This enables the Commission to act as the watchdog of the Indian economy in the public interest.

How does the watchdog function serve the public interest? Life is possible if it is affordable. Affordability depends on the prices of goods and services. Prices determine the quantity and quality of goods and services available to citizens. These prices are determined by competition between manufacturers and suppliers who serve the consumers. Lesser the fair price for the same or more quantity and quality, more are the consumers. This relationship of fairness between the manufacturer -supplier- consumer is possible only if the stream of supply and demand remains unpolluted. Greed pollutes the stream. There is as yet no vaccine against greed. Hence a Competition Commission is necessary to prevent, control and abate such

[3] Articles 298, 299 and 19 (6) of Constitution of India

[4] Article 39 (b): The State shall, in particular, direct its policy towards securing: (b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;

[5] Article 39 (c): The State shall, in particular, direct its policy towards securing: that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

pollution. The doctrine of the level playing field[6]is the constitutional answer to the displacement of competition to the common detriment. A Competition Commission becomes a necessity to enforce this doctrine. This doctrine while holding that opportunity is a fundamental right under Art. 21, the doctrine of level playing field is embodied in Art. 19 (1) (a), since it provides space within which equally placed competitors are allowed to bid so as to sub serve the larger public interest. How does the Competition Act, 2002 seek to enforce such a doctrine?

III. Commission: Powers as a National Monitor

It does this by imposing a national monitoring function on the Commission to ensure fair competition, an armada of powers concerning agreements and combinations having an appreciable adverse effect on competition as also abuse of dominant position, a range of remedies of financial deterrence, including the power to issue interim orders, combined with the principles of natural justice. The word "any" has been liberally used by the draftsman to create this kind of jurisdiction.

In *Competition Commission of India vs Steel Authority of India Ltd*,[7] the Supreme Court on Sept 9, 2010, pointed out that under the scheme of the Act, the Commission is vested with "inquisitorial, investigative, regulatory, adjudicatory and to a limited extent advisory jurisdiction". It further stated that vast powers have been given to the Commission to deal with complaints or information leading to invocation of the provisions of Sections 3 (anti-competitive agreements are void if they cause appreciable adverse effect on competition within India) and Section 4 (abuse of dominant position in the relevant market) read with Section 19 (specifies the factors to be considered by the Commission for purposes of Ss 3 & 4). Similarly, in Ss. 29-30 the Commission has been empowered to investigate Combinations.

Discontinuance or modification of anti-competitive agreements,[8]division of dominant enterprise[9] and discontinuance or modification of a combination[10] are other areas for which commission was statutorily empowered. The Commission can pass a range of orders to effectuate its aim of eliminating anti-competitive practices. If a dominant enterprise is indulging in

[6]*SeeReliance Energy Ltd. Vs Maharashtra State Road Development Corporation, Civil Appeal 3526 of 2007*, judgment of Sept 11, 2007.

[7]Civil Appeal 7779/2010.
[8] Under Section 27.
[9] Section 28.
[10] Section 31(3).

predatory pricing, that is selling goods or services below the cost of manufacture, then it can determine the cost of such manufacture under the Determination of Cost of Production Regulations, 2009. It has the jurisdiction to levy monetary penalties for the payment of which time can be extended and which can be turned by it into payment by instalments, on an application filed by the enterprise before the due date of payment of the penalty amount, under the Manner of Recovery of Monetary Penalty Regulations, 2011.

IV. No Delay Jurisdiction

These provisions of the Act read with the General Regulations, 2009 framed by the Commission,[11] show that matters related to contravention of the Act have to be dealt with expeditiously and in a time bound manner. Effective jurisdiction is a no delay jurisdiction. Otherwise the purpose of the Act in ensuring an open market and thereby preventing damage to the country's economy, gets frustrated. Ss 6, 26, 29, 30, 31, 53B (5), 53T and Regulations 12, 15, 16, 22, 32, 48 and 31, as well as Regulations, 2011 on Procedure for Transaction of Business Relating to Combinations, exhibit the legislative intention of a time bound disposal.

The Supreme Court in its judgment in the SAIL case has emphasized that the jurisdictional power to issue ad interim restrain orders must be exercised by the Commission by issuing notices for a short date and such applications must be dealt with expeditiously. To facilitate efficient timeliness by the Commission, it has a Secretary who has been conferred specific powers and functions.[12]

The Act provides the Commission with a Director General and his team for enabling the Commission to investigate into any contraventions of the Act, to form a prima facie opinion and decide whether an investigation should be ordered or not. This statutory bounty confers on the Commission an unprecedented jurisdiction that keeps on evolving from case to case.

V. Preventive Jurisdiction

[11] Regulations famed under S. 64 of the Act.
[12] Under Regulation 14(7) of the General Regulations, 2009.

It has already been pointed out that the Directive Principle Art. 39(b) and (c), as the constitutional public interest, anchor the Indian economy. The Commission ensures this public interest through the examination of laws and policies under the 2016 Guidelines for Competition Assessment of Economic Legislations and Policies, issued by it under S. 49(1) and (3) of the Act. This function of continuously scanning and identifying law and policies for their effect on competition and then taking these up for a time bound assessment through experts constitutes the preventive aspect of the Commission's four mandatory duties under S. 18–---to eliminate practices having an adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade. But the Commission's work under these Guidelines is hardly available to the public. No reasons are forthcoming for this. Publicity would encourage debate and help the private and State economic actors to realize in advance how to keep their aspirations within constitutional and statutory bounds.

The Commission's preventive jurisdiction extends to mergers/amalgamations, acquisitions and joint ventures, which have been on a rapid rise with the legislative and administrative changes in the wealth process laws. Under Section 6(2), persons entering or proposing to enter into a combination can seek approval for the combination from the Commission. They do not have to wait for the Commission to move in the matter on its own or on someone's information about the combination to the Commission. This is reinforced by Section 31(3) where a modification of the combination can be proposed by the Commission to eliminate, where possible, the appreciable adverse effect that will be or is likely to be caused by the combination. The jurisdiction is effective because if the modification is not carried out within the time specified by the Commission then serious consequences follow under the Act, starting with the presumption that the combination has an appreciable adverse effect on competition.

VI. The World Is the Commission's Oyster

The globalization of trade and capital has resulted in the Commission having extra territorial jurisdiction under Section 32 of the Act. Its power to inquire into an agreement, a dominant position or a combination having or likely to have an appreciable adverse effect on competition in the relevant market in India, continues even if the agreement, the party, the abuse or the combination is outside India. Being based in a foreign country does not provide any exemption from the Commission's domestic power to pass interim orders under Section 33, even *ex parte*, where it considers it necessary.

Further under S.5 of the Act, for the purpose of determining whether an acquisition, a merger or an amalgamation is a "combination" that falls within the jurisdiction of the Commission, the financial thresholds apart from an India asset and turnover test also have a global asset and turnover test. The Commission therefore becomes a global watchdog of transactions having an effect on competition in India.

VII. Jurisdictional Span Concepts

This unprecedented jurisdictional span of the Commission is tethered by two elastic concepts i.e. enterprise and relevant market. They say that to define is to limit. However, in the case of the Commission it seems to be otherwise.

(a) Enterprise

The unit to which the breaches of competition, agreements or dominant position abuse or combinations that have an appreciable adverse effect on competition, apply is an "enterprise". The definition of "enterprise" in S. 2(h) applies to "any" person or Government department engaged in "any activity" relating to the entire spectrum of goods and services of "any kind", financial or corporate, for the entire cycle of production to market delivery. The Explanation to the definition expands it further by stating what "activity", "article" and "unit or a division of an enterprise" include. Apart from the non-priced elements of living, like sleeping, there is no aspect in the twenty-four-hour cycle of a human being that is probably left out from the Commission's grasp overpriced human activity. If anything is still left, then that is amply covered by the further definition of the word "person" used in defining an "enterprise", which states in S. 2(l) what is included therein, and then by the definition of "trade" in S. 2(x). It is this bounteous jurisdiction that the Commission has to apply at the threshold of a case before it by deciding whether the person, department or entity before it is an "enterprise" or not.

(b) Relevant Market

Markets are the Commission's home. All competition is vis a vis a market, since the Commission's constitutional and statutory responsibility is to ensure a fair market. The market is the context and the activity of an enterprise therein is the text that the Commission examines. Hence in every case the Commission has to define the context or the relevant market. The edifice of competition law rests upon the dynamics of competition in one particular market. Relevant market is that market with respect to which the

benefits or harm to competition have to be assessed.

Section 2(r) lays down that the Commission may determine this by reference to the relevant geographical market and/or the relevant product market. The relevant geographical market is defined in S. 2(s) as meaning the area where the competition conditions for the supply of goods or services are "distinctly homogenous' and distinguishable from the conditions in the neighboring areas. It must have regard to any or all of the eight factors specified in S.19(6). In *M/S H T Media Ltd And M/S Super Cassettes Industries Ltd*[13]the Commission held that "Geographic market definition involves the identification of those firms, selling the products within the relevant product market, to which customers in the area will turn in the event of a significant price increase, and may also include firms that would enter the geographic are in response to such an increase." The Commission becomes a market surveyor and cartographer in its search for the relevant market that will give it the jurisdiction in a case.

The relevant product market is defined in S. 2(t) mean a market wherein the consumer regards the products or services in the market as interchangeable or substitutable, by reason of their characteristics, their prices or intended use. This is not only a product to product and service to service jurisdiction, but a comparative product and comparative service jurisdiction.

VIII. Multiple Jurisdictions

Under Section 60 of the Act, its provisions have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Under Section 62 of the Act, its provisions are in addition to and not in derogation of the provisions of any other law for the time being in force. In the light of these two Sections, what happens if the issue raised before it involves the Copyright Act or the Patents Act? The Commission's broad answer is that as cross sector regulator the competition aspect falls within its jurisdiction.

In *M/S HT Media Ltd vs M/S Super Cassette Industries Ltd*[14]the Commission was faced with the compulsory licensing and royalty determination jurisdiction of the Copyright Board, in a dispute between the parties before

[13]Case No.40 of 2011

[14]*Ibid.*

it, under the Copyright Act while determining whether the respondent party owning most of the Bollywood music was abusing its dominant position concerning the terms and conditions on which it would allow this music to be played on the private FM radio stations. The Commission pointed out that it recognizes the role of sectoral regulators like the Board and exercises is jurisdiction accordingly. In this case the Copyright Board under the Copyright Act, had nothing to do with eliminating market practices which have an adverse effect on competition in the market of works protected by the Copyright Act. Hence it had the jurisdiction to decide the competition issue raised before it.

In *TelefonaktiebolagetLm Ericsson vs Competition Commission of India*,[15] the Delhi High Court judged the issue[16] of patents and the Competition Act. Micromax and Intex alleged that Ericsson having a large portfolio of Standard Essential Patents in respect of technologies used in mobile handsets and network stations, had abused its dominant position. The standard essential patents held by Ericsson are technologies which have been accepted worldwide as standards to be universally implemented to ensure compatibility for a seamless transmission of data and calls across the world. Ericsson filed a patent infringement alleging violation of its patents. After several rounds of the suit and a failed mediation Micromax filed the abuse of dominant position information against Ericsson, before the Commission, alleging that the royalty demanded would simply drive it out of the market. The Commission held that the royalties demanded by Ericsson did not have any link to the patented product and they were contrary to the FRAND (fair, reasonable and non-discriminatory) regime under which Ericsson had the patents. It found a prima facie case against Ericsson and directed the Director General to report to it after holding an investigation. Ericsson came to the high court against this order contending that the Commission had no jurisdiction in the matter as any issue regarding the claim of royalty would fall under the Patents Act, 1970 and not under the Competition Act. Holding that patents are goods under the Sale of Goods Act, that a patentee dealing in such goods is an enterprise under the Competition Act., the high court pointed out that the remedies of abuse of patents under the two Acts are different. Moreover, the width of the orders under the Acts is also different, since the orders of the Commission are in rem whereas under the Patents Act the specific remedy is to the person seeking relief. While the remedies under Section 27 of the Competition Act for abuse of dominant position, are materially different from the remedy under Section 84 of the Patents Act, yet the two are not

[15] W.P (C) 464 of 2014.
[16] Decided on March 30, 2016.

mutually exclusive as the grant of one is not destructive of the other. Hence it would be open for a prospective licensee to approach the Controller of Patents for grant of a compulsory license in certain cases. This is not inconsistent with the Commission passing an appropriate order against abuse of dominant position under Section 27 of the Act. Hence there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. In such a case the jurisdiction of the Commission to entertain complaints of abuse of dominant position in respect of patent rights cannot be ousted.

IX. Undefined Concepts

Two undefined concepts underpin the vast jurisdiction of the Commission guided by the definitions of Enterprise and Relevant Market in Ss. 2(h), 2(t), 19 (6) and 19(7). These two concepts are, "competition" and "appreciable adverse effect' of the breach of competition within the relevant market in India.

The reason for not defining these is because both the concepts statutorily are evidence-based conclusions which trigger consequential powers of the Commission ranging from imposition of penalties to ordering division of an enterprise. No matter how the Commission's jurisdiction is triggered, on its own or by an informant or by a reference from the Central, State Govts or statutory authority, the definitions and the provisions of the Act have to be applied by the Commission on the facts concerning the various kinds of conduct of each enterprise. This evidence-based approach is the exercise of jurisdiction on the rule of reason. The only exception in the Act is Section 3(3) wherein an appreciable adverse effect of a decision, practice or an agreement is presumed if it results in four kinds of specific consequences Even here the presumption is rebuttable. This makes the work of the Commission, both inter and multi-disciplinary.

X. Director General's Office

This complex web of jurisdictional facts to support the extraordinary jurisdictional span, in fulfillment of the constitutional and statutory duty to ensure fair competition, necessitates a matching data gathering and analytics infrastructure. The legal provision exists under S.16 for a Director General whose function apart from assisting the Commission in conducting an inquiry into the contravention of "any" of the provisions of the Act, also requires him to perform "such other functions" as are or may be, provided under this Act. Under S.17, the Commission can appoint a Secretary and

"such officer and other employees, as it considers necessary for the "efficient performance of its functions under the Act". The Commission may also engage experts and professionals in various disciplines related to competition, for discharging its functions under the Act.

XI. Vacancies

However, it seems that crucial vacancies in the Director' Office the Commission is probably unable to make full use of these provisions to fulfil the vast task of being the competition monitor of the Indian economy, as per its duties under S.18. The Commission's Annual Report 2015-16 shows that against the twenty sanctioned posts of Deputy Director General only five have been filled up. Similarly, against the sanctioned posts of one for the Deputy Director General (CS) and three for the Assistant Director General (CS), zero posts have been filled up.[17] Similarly, the Commission has three sanctioned posts of Adviser (Law) with only two filled up, Director Law has five sanctioned posts and only two are filled up, Joint Director Law has ten posts with only two filled up and Deputy Director Law eighteen sanctioned posts but only 13 filled up.[18] The Annual Report 2014-15, shows generally the same state of affairs both for the Office of the Director General and the Commission.[19]

These vacancies, especially those of law posts, are a matter of concern, since the Director General is under statutory time deadlines under Regulation 20 of the General Regulations, 2009, concerning investigation reports for the Commission. These deadlines can be extended by the Commission only on the showing of "sufficient reasons" by the Director General. Hence the Director General and his office is a crucial input for the efficient timeliness in dealing with anti-competitive behaviour in relevant markets, insisted upon by the Supreme Court in the SAIL judgment.

XII. Natural Justice

The Act explicitly provides that while the CCI has the power to regulate its own procedure, it shall be guided by the principles of natural justice in the exercise of its powers.[20] Further, regulations that supplement the Act also lay down that the CCI and the office of the Director General (DG) must adhere to the principles of natural justice while dealing with enforcement

[17] P.53 of the Annual Report 2015-16 Table No. J4: Incumbency Position in the Office of DG.
[18] Annual Report 2015-16, p.52, Table No. J3: Incumbency Position in the Commission.
[19] Annual Report 2015-16, p.37-38.
[20] Section 36(1) of Competition Act

proceedings. Besides, the Supreme Court's seminal judgment in *Competition Commission of India v. Steel Authority of India Limited ("SAIL Case")*, forms the foundation of Indian jurisprudence in the field of competition law and due process. The Supreme Court while examining the scheme of the Act, held that the CCI being a quasi-judicial authority, is bound by the principles of natural justice.

Given the expansive jurisdiction of the Commission, its power to say yes or no as to the existence of a prima facie case becomes crucial and therefore a high-pressure point for the informant and the enterprise complained against. This is more so, because the Supreme Court in*SAIL case*,[21] has held that the Commission is under no legal obligation to hear the parties while forming its prima facie opinion, that it has only to give some and not detailed reasons for its opinion and lastly its prima facie opinion order is not appealable under the Act. Five years later the Delhi High Court in *Google Inc vs Competition Commission of India*,[22] held that the Commission can review its prima facie order as the formation of an opinion by it about the existence or non-existence of a prima facie case is an administrative act. It is a matter of some concern that even at the stage of hearing after the prima facie opinion and investigation, there are natural justice problems, as shown by orders of the Competition Appellate Tribunal (COMPAT).

Quite a few orders of COMPAT show a failure of the Commission on this front. In *Chemist and Druggist Federation, Ferozepur vs Competition Commissionof India*[23]Compat found that the Commission had not served a notice to the office bearers.In *Lafarge India Ltd &Ors. Vs Competition Commission of India*[24]& 22 tagged matters, Compat held that it could not be held that no prejudice had been caused to the appellants by the participation of the then Chairperson of the Commission in signing the order, when he had not heard the matter. In M/S Escorts Ltd vs Competition Commission of India,[25] COMPAT found inter alia that the procedure adopted by the Commission was in violation of the principles of natural justice. In *Dr. L.H. Hiranandani Hospital vs CCI*,[26] COMPAT raised the question as to why there was no effort on the part of the Director General

[21](2010)10 SCC744.

[22] 2015 (150) DRJ 192.
[23]Appeal NO. 21-28/2014.

[24]Appeal No.103/2012.

[25] (Appeal No.13/2014)
[26]Appeal No.19/2014.

while investigating the case, to seek information from the person who was presumed to have faced the abusive conduct. In *Himachal Pradesh Society of Chemist & Druggist Alliance vs CCI*[27] COMPAT held that the investigation conducted by the Director General was in violation of the principles of natural justice as it had relied upon forged and fabricated documents. Appellant had been denied the opportunity to cross examine the first respondent. The Commission failed to consider the issue of violation of principles of natural justice by the Director General. In *M/S Surendra Prasad vs CCI*[28]**the** COMPAT found that the Commission had ignored the Supreme Court judgment, *M/S B.S.N Joshi & Sons Ltd vs Nair Coal Services Ltd*,[29] even though the informant had cited the judgment.

During the year 2015-16 30% of the Commission's orders on existence of a prima facie case, closing cases on no contravention recommendation of Director General after hearing the parties, orders on dominant enterprises and interim orders, were appealed against and 40% of these orders were set aside by COMPAT.

XIII. Sunlight on Prima Facie Closure

There is also the issue of sunlight acting as a disinfectant in the 80% of the orders passed by the Commission at the prima facie stage for closure of the cases, resulting in no investigation by the Director General and hence no further action. All such matters with the materials should be open to the public, especially academic researchers, to see whether there is a consistency in such orders. Consistency of orders vis a vis similarly placed enterprises is a part of the fundamental right of equality under Art.14 of the Constitution, which prohibits arbitrariness and hostile discrimination. This may help construct a jurisprudence of prima facie closure cases. Public confidence would be enhanced if the Commission publishes all such orders along with a gist of the materials.

XIV. Three Issues

The discussion above gives rise to three issues that probably need to be publicly debated. Firstly, whether the role of the Commission as regulator

[27]Appeal No. 58/2015.

[28]Appeal No.43/2013.

[29]Oct 31, 2006.

and investigator is problematic. The OECD recommendation of the Council on Regulatory & Policy Governance, 2012, states that the role and function of the regulatory agency should ensure that "decisions are made on an objective, impartial and consistent basis without conflict of interest, bias or improper influence."

Secondly, should the Union Ministry of Corporate Affairs be the administrative Ministry of the Commission when the Commission 's jurisdiction requires it to decide upon corporate conduct under the Act. Would it be in the larger public benefit if the administrative Ministry of the Commission is the Union Law Ministry? Hopefully then, the large number of vacancies in the Commission and the Director General's Office concerning law posts would not occur and continue year after year. Proper arrangement of governance strengthens institutional integrity and the credibility of the regulator.

Thirdly, given the substantially large number of cases (80%) closed at the prima facie stage, is there a problem with competition advocacy before the Commission in terms of public awareness Does this necessitate a public education programme so that persons do not waste their and the Commission's time and resources by filing a large number of cases that get closed at the prima facie stage itself.

These are some urgent reforms that the Commission owes both to itself and the Indian public. This is so because competition is the bedrock of Constitutionalism. Monopolization of political power wrecks political democracy. Monopolization of economic power wrecks economic democracy. Since political democracy cannot function without economic democracy, competition is a necessity for both. The doctrine of constitutionalism or limited government requires therefore that competition itself be regulated. Both a free-for-all competition and the absence of competition endanger representative parliamentary democracy, which functions on the premise of limited public and private power. Unbridled private power tends to take over public political power. Unbridled public power suffocates private initiative and action. Balancing powers, the Constitution of India laid the basis for regulated competition by learning from India's colonial experience.

But the Commission seems to be under an official policy of squeeze in the competing principles of ease of doing business and transparent monitored fairness to the consumer. That is the probable reason for the Commission

not having any office other than at Delhi,[30] while business and consumers having increased exponentially since the Commission's inception in 2002.

[30]S.7 (3) of the Competition Commission of India Act 2002 empowers the Central Government to decide the place for the Commission's headquarters. S.7 (4) states, "The Commission may establish offices at other places in India."

COAL INDIA LTD V GOCL, HYDERABAD &ORS

ELUCKIAA A[*] AND ANWESHA PAL[**]

ABSTRACT: *This case is a classic example as to how cartels were regulated in India. The present case is about bid rigging and price fixing through the concerted action of explosive supplier companies. Although the report of the Director General found no merit in the allegations made by the informant, on objecting to the same, the Commission ruled otherwise finding for CIL in one of the allegations wherein it was seen that the opposite parties had deliberately tried to manipulate the tendering procedure floated by the informant. Such collusive behavior is frowned upon by the Competition Act of 2002. Therefore, in conclusion we see that the prosecuted explosive suppliers were aptly penalized under Section 27 of the Act, and a heavy fine to the tune of 3% on each of their average of three years turnover was levied. Although a penalty was charged, there remains a scope for improvement in the laws relating to regulation of competition in India. To ensure national welfare, competition in the market needs to be maintained at all times. To further this cause, mere civil penalty may seem inadequate as it lacks the effect of deterring similar behaviour among market players. This can be seen in the cases of such similar collusive behaviour in the market during the present times as well. Therefore, a stricter law relating to penalties for violation of competition laws and objectives is the need of the hour.*

Undertaking

This is to certify that the reported work in the paper entitled Case Comment on Coal India Ltd v GOCL, Hyderabad &Ors submitted for publication in the Corporate & Competition Law Review is an original one and has not been submitted for publication elsewhere. We further certify that proper citations to the previously reported work have been given.

Eluckiaa A.

Anwesha Pal

CASE COMMENT

The present case analyses the allegations put forth by the informant on the opposite parties for engaging in anti-competitive activities. The allegation here is one of the gravest forms of anti-competition, which are cartels.

Cartels, as we know, are horizontal agreements, and are of four kinds such as for price fixing, market sharing, for limiting output in the market and collusive bidding. Price fixing agreements are those which involve similarities in either actual or minimum price or a schedule of prices. On the other hand, it could also be regarding the similarity in behaviours of limiting discounts, discontinuation of a free service or levying agreed surcharges. On the other hand, bid-rigging may involve bid rotation, bid suppression or collusive bidding. Output restriction agreements are a form of anti-competitive agreements which intends to put a limit to the supplies to be sent to the market.

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Coal India Limited, also known as CIL, who is the informant in the present case, is an organized state owned coal mining corporate[1], which is also a Maharatna[2] company. Coal India Limited is a Central Government Public Sector Undertaking, which used to be wholly owned by Central Government until the recent spate of disinvestment, having seven wholly-owned subsidiariesengaged in coal production, and with one mine planning and consultancy company[3].CIL is engaged in the business of "production of coal of various grades" through mining operations in various coal belts of India.[4]

CIL which essentially carries on business in coal, needs explosives for its mining operations and they procure the explosives from the opposite parties. Until 2009, EMAI (Explosive Manufacturers Association of India) represented the explosive suppliers and communicated with CIL on their behalf. But after 2009 when EMWA (Explosives Manufacturers Welfare Association) was established, they started representing the explosive suppliers before the informant.[5]

The informant, CIL enters into running contracts with the explosive suppliers for the supply of bulk and cartridge explosives with other accessories for its open cast and underground coal mines which were procured through a process of public tender. CIL also empanels some suppliers in reserve so that when a particular running contract holder fails to supply the explosives it may place orders on them in order to get assured supply of explosives.

Informant obtained explosives through a public tender by way of techno-commercial bills and price bids by the short-listed bidders. Previously, these bids were to be submitted in paper form but since 2007-08, a method of electronicreverseauction[6] was introduced and the same was used for price bids in accordance with the guidelines issued by Central Vigilance Commission of India.[7]The introduction of the electronic reverse auction was essentially to conduct a transparent and fair tender process. However, it was alleged that the explosive suppliers who had a market share of about 75% had formed a cartel.[8] The informant alleged that by virtue of this cartel they collectively boycotted the Electronic Reverse Auction which was organized for finalizing a running contract[9] in January 2010 and they collectively

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[1] See Coal India Limited: About us, *available at* https://www.coalindia.in/en-us/company/aboutus.aspx

[2]Maharatna scheme was initiated for CentralGovernment Public Sector Undertakingswith effect from 19th May, 2010 to empower mega PSUs for expanding their operations. See BSEPSU.com: The Maharatnas, *available at* http://www.bsepsu.com/maharatnas.asp, Press Trust of India, "Coal India gets Maharatna Status", *Business Standard*, April 11, 2011; available at http://www.business-standard.com/article/companies/coal-india-gets-maharatna-status-111041100161_1.html

[3] See Coal India Limited: About us, *available at* https://www.coalindia.in/en-us/company/aboutus.aspx.

[4] Coal India Limited vs. GOCL Hyderabad &Ors., Case No. 06/2011 at p2; available at http://www.cci.gov.in/May2011/OrderOfCommission/062011.pdf. Hereinafter referred as the Order of the CCI.

[5] Id.

[6] Reverse auction is anauctionwhere sellers bid for the price at which they intend to sell their goods. See Investopedia: "Reverse Auction", *available at http://www.investopedia.com/terms/r/reverse-auction.asp*.

[7] The order of the CCI at p 4

[8] Id

[9] In rate contracts, suppliers are not sure of order quantities and therefore they do not want to take risk by making investments in Machinery & Plant and Raw materials required for manufacture of goods. They, therefore, insist that some estimate of quantity to be purchased should be provided in the contract. Therefore, if in a contract entered for a specific period of time, like Rate Contract, if we give an indication of minimum quantities to be purchased, the Contract is known as running contract. Generally running contracts have liberal quantity tolerance clauses according to which quantities can be increased or decreased by 25 to 30% For running contracts also separate supply orders for actual drawal of the materials are required. See http://www.nfr.railnet.gov.in/store/read/ch6.htm.

stopped supplies and they also threatened to stop their supplies for the years 2006, 2007, 2009 and 2010[10], and that the opposite parties collectively fixed bid prices in 2009 and also submitted identical price bids in 2005-06.[11]

The informant alleged that the act of the opposite parties contravened the provisions of Sections[12] 3(3)(a), 3(3)(b) and 3(3)(3)(d) of the Competition Act, 2002 and submitted that their act not only affected their business but also the interests of the end consumers because of the final prices of the products and lower availability of output in market.[13]

The Commission opined that there was a *prima facie* case and therefore, directed the Director General to investigate the matter under Section 26 of the Competition Act, 2002.[14] Accordingly the Director General[15]conducted an investigation in accordance with Section 19 of the Act and submitted a report.

The Report of the DG started out by determining the relevant market according to Section 19 (5)[16] read with Sections 19(6)[17] and 19(7)[18] of the Act, as the market for consumption of bulk and cartridge explosives within the territory of India.

The allegations cast by CIL on the explosive suppliers was of collectively fixing the sale prices of explosives to which the DG found that although the explosive suppliers participated in the process of sealed tender, the prices quoted by these explosive suppliers were similar during 2005-2006 which clearly reflects the meeting of minds and their collusive behaviour. According to the DG, the explosive suppliers were spread across the country and had participated in the process of sealed tender and had quoted an identical enhanced price of Rs.19,500/- per MT[19] during 2005-06 whereas the last purchased price was that of Rs.13,282 per MT for bulk explosives which clearly indicates a jump of 45%.

The explosive suppliers argued however that due to the sudden increase in the price of the raw material ammonium nitrate, the Chairman, CIL had suggested them to quote the enhanced price in the subsequent tender bid to compensate for the loss incurred by them during 2004, even though there was no documentary evidence to corroborate the same, and even CIL denied having any such understanding with the explosive suppliers.

Section 3 of the Act was notified only in May 2009, whereas this collusive fixation of bid prices happened in 2005-06, which also did not continue in contract for the subsequent year. Therefore, their conduct was not in contravention of Section 3(3) of the Act.

Secondly, the DG found out that the informant CIL had expressed its intention not to continue the running contract of three years because of the reduction in the prices of

[10] Id

[11] Id

[12]Section 3(3) deals with anti-competitive agreements.

[13] The order of the CCI at p4 of the Order.

[14] Section 26 (1), lays down the procedure for inquiry on complaints under Section 19 of the Act.

[15]Hereinafter referred as DG.

[16]Section 19 lays down provisions relating to inquiry into certain agreements and dominant position of enterprise, whereas, Section 19 (5) lays down the provisions relating to determination of a "relevant market" by having due regard of the relevant product and geographical markets.

[17] Section 19 (6) lays down the parameters the Commission must consider and have regard to while determining the "relevant geographic market".

[18] Section 19 (7) lays down provisions relating to the determination of relevant product market, wherein parameters have been laid down which the Commission shall have due regard of.

[19] Metric Tonnes

ammonium nitrate in the market. To decide on this issue the Chairman CIL and the explosive suppliers conducted meetings wherein the Chairman CIL suggested to members of EMWA to give their opinion in writing. The members of EMWA wrote a letter dated 13th October, 2009 requesting the Chairman, CIL to not curtail the duration of the duration of the previous contract contract as there was an uninterrupted supply of explosives which they would be able to continue for the period of next three years as well. According to the EMWA, however, if the duration of the contract was reduced, they would incur a substantial loss. The EMWA assured CIL that they would agree to a change in the price modification clause and assess the prices for the second year, as per their mutual consent. The informant contended that this letter was an attempt by the EMWA to fix the price of explosives sold to them. The DG, through the aforementioned observed that the informant had ignored the contents and context of the letter and the letter did not establish that the opposition had formed a cartel for price fixing, since it was a letter to justify the continuation of the running contract. Thus the opposition had not contravened the Section 3(3) of the Act in principle.

The DG had conducted investigations for three periods:

- 12th April 2006- 16th April 2006
- 31st January 2009- 1st February 2009 and 21st March, 2010
- April 2010- June, 2010

In the period between 12th April, 2006 and 16th April, 2006, it was found that there was a collective stoppage of supply of explosives. However, it was on account of a protest against the unilateral amendment of penalty clauses based upon weighted average powder factor and cannot be held violative of Section 3(3) (b) as Section 3 was only notified in 2009.
In the period between 31st January, 2009 and 21st March, 2010, a copy of fax dated 16th July, 2010 was furnished before the DG, which stated that there was no supply of the bulk loading explosives to one of the subsidiaries of CIL. However, since the matter concerned only one of the subsidiaries, and the supply to other subsidiaries remained largely unaffected. Hence, there was no violation of Section 3(3) of the Act.

In the period between April, 2010 and June, 2010, it was found by the DG that there was no limiting or controlling of market supply as there was a stoppage of supply only for a couple of days by an individual company because of shortage of raw materials and because of the financial crunch. Therefore, there was no evidence of collective decision to stop the supply of explosives and hence, no violation of Section 3 (3) (b).

Fourthly, the DG found some explosive suppliers issued identical letters to the informant threatening that they would stop the supply from 25th October 2010. It was alleged that there was a collective threat of stoppage of supplies as thecontents of the letters were identical .However the DG found that non-supply of explosives on one particular day would not amount to collective stoppage of supplies and moreover there was proof regarding regular supply of explosives like contract orders and supply statements which were furnished by the explosive suppliers. DG also submitted that the explosive suppliers attempted to supply more than 90% to become eligible for the subsequent tenders. It was further found that the subject matter of the letters were identical because it related to the common interest of the explosive suppliers and it dealt with safety, security and transportation of explosives which were in compliance with the guidelines of the Petroleum and Explosives Organization (PESO)[20].

[20]The Petroleum and Explosives Safety Organization (PESO) is an organization that deals in matters relating to safety in manufacture, storage, transport and handling of explosives, petroleum, compressed gases and other hazardous substances through comprehensive administration of Explosives Act, 1884, Petroleum Act, 1934, Inflammable Substances Act, 1952 and rules framed there under. Available at: http://peso.gov.in/index.aspx.

Thus, the DG concluded that there is lack of evidence to show that there was a collective threat of stoppage of supplies and therefore there was no cartel-like behaviour on the part of the opposite parties towards controlling or limiting supplies by way of issue of collective threats in violation of Section 3 (3) (b) of the Act.

The fifth issue for consideration was that of collective boycott of Electronic Reverse Auction wherein the explosive suppliers who were technically qualified would be given ID numbers by CIL so that they can login to the system and submit their bids. However, according to CIL, except the two bidders- (i) Sri Krishna Explosives, and (ii) Premier Explosives Limitedno other bids were received from any other supplier. The opposite parties contended that the ceiling fixed by the informant was incorrect and not commercially viable for them. According to DG the informant in fact, violated norms of notice inviting tenders, by not giving contracts to the two explosive suppliers who had submitted their price bids. Instead electronic reverse auction was rescheduled and all other bidders participated in it irrespective of the fact that the ceiling price was not changed. This indicated that they did not have any intention to boycott the electronic reverse auction.

After receiving DG's report, the Commission forwarded the same to the informant and the opposite parties. To which the opposite parties denied all allegations made against them and the fact that they were involved in any anti-competitive activities. However, they did not submit any reply to the substantive issues but merely submitted their financial details for 2008-09, 2009-10 and 2010-11.

The informant Coal India retaliated and expressed disagreement with DG's findings, and contended that the analysis of the price bids apart from 2005-06, for 2004-05, 06-07, 07-08 and 08-09 showed the existence of cartels among the explosive suppliers. They alleged so based on various reasons such as the difference of the bids was very small (around 1%-5%) of the bid price, the explosive suppliers were intending to continue the supply even after negotiations and this suggests that the initial bids may not be at competitive prices and were artificially being kept at a high level, there was market sharing whereby different explosive manufacturers won different bids, and in conclusion, thebehavior of the explosive suppliers showed that the pricing decisions were not done in an independent manner. The informant further alleged that it was evident from the letter dated 13th October 2009 that EMWA was taking decisions with regard to pricing as it was ready to amend the price variation clause and it was collectively negotiating with the informant which is against the spirit of Section 3 (3) of the Act.

The informant alleged that the DG had ignored various letters written by the informant and its various subsidiaries showing the evidence of shortages and stoppages in supplies of explosives by explosive suppliers. The informant alleged that the DGs' conclusion that minimum quantity required to be eligible for submitting bids in the subsequent tenders, was supplied by the suppliers was not consistent with the actual situation where the suppliers were very erratic. The informant alleged that several suppliers failed to supply 90% which was needed to be supplied for them to be eligible to re-tender.

The informant contended that there was a collective boycott of e-reverse auction, and was served with identical letters by the suppliers which indicates towards a meeting of the minds. Also thesubmission of bids in the second auction which was marked up to 32.08% below the ceiling price went on to show that it was clearly economical to sell below the ceiling price, which highlighted the wrong intentions on the part of suppliers to manipulate the bidding process.

Lastly, according to the informant, this collusive activity of the opposite parties in pursuance of a cartel had a negative impact on its business and also its consumers (including entities involved in power generation and steel production). It also submitted that it is the largest coal producer in India and this negative impact would be detrimental for the country's economy and development as a whole.

The first issue that was put forth before the Commission for determination was if there was any fixing of bid prices by the explosive suppliers under an agreement as alleged by the informant. The Commission accepted the DG's view regarding the collusive fixation of bid price during 2005-06. However, since Section 3 of the Act came into effect only from 2009, this behavior was not held illegal as it did not violate Section 3.

The informant in its objection had contended that the DG did not observe the identical bids for 2007-08 and 2008-09. The Commission went through the quotes of the explosive suppliers for the years 2007-08 and 2008-09 and found that the bid prices quoted by the suppliers during these years were not identical, and there was no evidence to show that the bid prices were manipulated. The Commission after going through the contents of the letter found that the letter was merely a justification provided on behalf of the explosive suppliers who had already built up sufficient raw materials for the next three years in accordance with notice inviting tenders. Therefore, the discontinuance of the contract before the three years period would have been detrimental to the interests of the explosive suppliers. So, the Commission observed that EMWA's agreement to amend the price variation clause with a mutual understanding of both the parties was not indicative of fixing the price but merely expressed the grievance of the explosive suppliers.

The second issue before the Commission for determination was that if the explosive suppliers were under any agreement to control and limit supply of explosives to CIL. The Commission accepted the DG's view in this regard that the supply of explosives was stopped from April 12, 2006 to April 16, 2006 and that the same could not be considered as a contravention of Sec 3(3)(b) as the provision of Sec 3 had not been notified until May 20, 2009.

The Commission also considered the letters and were of the opinion that they related to non-supply of allotted quantity of explosives. The Commission also observed that these letters were addressed to the individual suppliers and required them to supply the allotted quantity of explosives failing which the informant was to take action against the suppliers as per the terms of the running contract. The Commission thus held that there was no collective decision to limit supplies with an intent to make profits and therefore therewas no contravention of sec 3(3)(b) of the Act.

The third issue for determination before the Commission was that of manipulation of the bidding process by the suppliers by boycotting the e-reverse auction. In the present case the bidding process happened in two stages- Techno-commercial bid and e-reverse auction bid. After scrutiny of techno commercial bid, the shortlisted suppliers were invited for e-reverse auction. However,twenty eligible suppliers for bulk explosives and twenty six eligible suppliers for cartridge explosives participated in the mock bid that was held. Except for two bidders, no other bidders participated in the e-reverse auction for the supply of bulk explosives.

The Commission after considering the records was of the opinion that the letters wrote by GOCL Hyderabad and Blastec India Limited were identical and the Commission held that it proved the meeting of minds. Moreover when the bidding was conducted the second time, the bidders participated and quoted prices substantially below the ceiling price, which clearly

contradicts the previously mentioned reason for not participating in the bid. Therefore, a concerted action which was violative of sec 3 (3) (d) of the Act, was found to have been perpetuated by the suppliers, who in fact held 75% of the market share. Such an act committed by such suppliers had also causeda delay in finalizing the contracts and had resulted in limited supplies of the explosives which was also in contravention of sec 3(3)(b).

Therefore, in conclusion, in its order, the Commission found that the non-participation in the e-reverse auction by the explosive suppliers was inviolation of the provisions of Section 3(3) (b) and (d) of the Act. Since the informant in the information had given the names of only ten parties, the Commission had taken orders only against them as they were the only ones alleged to have contravened the provision of the Act. The Commission therefore decided to levy penalties of 3% on the average turnover of three years, on the ten explosive manufacturersnamed in the information under Section 27(b) of the Act. The Commission ordered the parties to cease and desist from engaging in any manipulating practices of bidding.

Conflict in Global Currency Regulations: Bretton Woods & Now

~ Ajit Kaushal*

Abstract - There is a genesis of conflict in the area of global currency regulations. History shows, in the past various governments have resorted to manipulative exchange rate policies in order to gain an unfair advantage in the trade. Repeatedly, United States of America has alleged that China is manipulating its exchange rate in order to gain an unfair advantage in international trade, for an example. After the World War – II, USA emerged as the savior of the world. It was USA only among the major economies that could bail out the other nations for restoring its infrastructure. This Article is centered on the political conflict during the Bretton Woods conference (i.e. IMF) and about its political background. Along with the past, this Article also examines the present state of conflicts in the global currency regulations. The politics of currency is still growing and a new turn in this arena has come because of the regime change in USA. Recently, a very famous tweet by US President Mr. Donald Trump on 16th April 2018, 8:31 PM - "Russia and China are playing the Currency Devaluation game as the U.S. keeps raising interest rates. Not acceptable!" This must be noted that a country may have an upper hand in international trade by devaluing its currency and many countries take the benefit of the fact and that there is no dispute settlement mechanism with regard to the currency dispute.

Key Words – Currency Regulations, Politics of Currency, Bretton Woods, IMF, Recent Conflict of Currency between USA & China, White and Keynes Plan.

This is to certify that the reported work in the paper entitled "Conflict in Global Currency Regulations: Bretton Woods & Now" submitted for publication in the Corporate & Competition Law Review is an original one and has not been submitted for publication elsewhere. I further certify that proper citations to the previously reported work have been given.

In Washington Lord Halifax

Once whispered to Lord Keynes:

"It's true they have the money bags

But we have all the brains. – Anonymous (about the British intent during the Bretton Woods Negotiation)

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Introduction

There is the genesis of conflict in the area of global currency regulations. History shows, in the past various governments have resorted to manipulative exchange rate policies in order to gain an unfair advantage in the trade. Repeatedly, United States of America has alleged that China is manipulating its exchange rate in order to gain an unfair advantage in international trade[1], for an example. After the World War – II, USA emerged as the savior of the world. It was USA only among the major economies that could bail out the other nations for restoring the infrastructure. All the European nations, including United Kingdom, were badly ravaged due to the years long war. The post war economic situation had helped USD to get established as a world currency. However, it will also be wrong to say that the whole benefit of the USD 'regime' has been reaped by the USA only. United States strived to establish a multilateral and free trade regime; and such regime established by the USA has been largely benevolent which helped even the other European and Asian nations to get benefitted by the free trade and economic liberalization.

The IMF has mandated its members to not to manipulate the exchange rate.[2] USA has been alleging that China artificially devalued its exchange rate against the dollar in order to gain an unfair advantage in the international trade market. Such artificial devaluation makes the Chinese products cheaper in the USA market and USA manufactured products costlier in the Chinese market. It has been alleged that the currency devaluation has harmed a lot to the US manufacturing sector. It resulted in the reduction of demand of the US manufactured products in the international market. Article IV of the International Monetary Fund, Articles of Agreement deals with the laws relating to currency manipulations but until now, no country has been declared as currency manipulator. It raises a general question whether IMF rules relating to currency manipulation is a weak law. Otherwise, how would it be possible that IMF could not declare any nation as currency manipulator among the hundreds of potential cases?

Politics of Currency

One of the most important features of the international relationship is international trade and investment. The IMF promotes international monetary cooperation, provides policy advices, emergency financial services and loan to its members.[3] In the globalized environment, it becomes difficult to contain the movement of capital and money. It is one of the reasons that the need of a regulatory body was felt immediately after the general recession of 1929. However, the bigger questions remains, what actually prompted the member nations to negotiate the matter of currency discipline at a time when the conclusion of the catastrophic World War – II was not even in the sight? For this purpose we will have to revisit the monetary system of the world after the World War – I.

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[1] Recently, a very famous tweet by US President Mr. Donald Trump on 16th April 2018, 8:31 PM - "Russia and China are playing the Currency Devaluation game as the U.S. keeps raising interest rates. Not acceptable!" See https://www.businessinsider.in/Trump-launches-peculiar-attack-on-China-and-Russia-for-playing-the-Currency-Devaluation-game/articleshow/63787190.cms (accessed on 10.05.2018).

[2] Article IV(1)(iii) of Articles of agreement – "... each members shall - (iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members.

[3] See IMF Mandate, International Monetary Fund Factsheet, *available at*http://www.imf.org/external/np/exr/facts/pdf/imfwb.pdf (accessed on 5 May 2018).

Competitive Currency Devaluation of the 1929 Recession

The great depression was the longest prevailing recession in the human history, from 1929 to 1939. Depression was marked by drastic declines in output, unemployment; and acute real price and output fell fast. That was most severely felt in USA but it was spread to the entire globe. Gold scale was widely criticized as a reason of the great depression of 1929 and many countries had to abandon it. The fixed currency exchange played a pivotal role to spread the recession from USA to the other countries of the world. Most important, during the great depression, various governments took desperate steps to increase their exports by devaluing their currencies. This is notable that when a government devalues its currency value, its product becomes cheaper in the international market (i.e. it boosts exports) and simultaneously, the products exported in the domestic market of devaluing nation becomes costlier (if such policy is observed for a very long period, it will fall in the category of currency manipulations[4]). The situation worsened due to the competitive currency devaluation adopted one by one by the competitor nations in order to get an unfair advantage in the business. Ultimately, it transmitted the impact of depression from one economy to another.

The policy makers were aware about the fact that such instance could have been repeated after the World War – II and they wanted to avoid such a scenario. Due to this reason, European and American governments negotiated currency discipline even before the conclusion of the World War – II, which ultimately culminated into Bretton Woods. Bretton Woods was the beginning of new era of currency politics after the World War – II.

Keynes and White Plans – Political Clashes in Bretton Woods Agreement

The Bretton Woods agreement that regulated the international monetary system immediately after the World War – II, is mostly the result of negotiation between the Harry Dexter White and John Maynard Keynes, who were the US and UK appointed negotiators respectively. The influence of United States was quite clear during the negotiation phase hence Bretton Woods agreement reflected much more US plan than what was proposed by the British negotiator. The Bretton Woods agreement was the result of a prolonged parley between the parties who had deliberated and debated the form and function of the upcoming monetary and exchange regulatory system. A total forty-four countries were the parties of the Bretton Woods agreement. It was a wartime negotiation and when the negotiation was started, Germany was already making a good progress on the front. Many of the negotiating governments were already defeated or spending their time in exile. Hence, no country other than USA and UK were able to negotiate or debate. It is one of the reasons why this plan was known as the Keynes & White plan.

The International Monetary Fund (or "Fund") was first conceived in the Bretton Woods agreement that took place in New Hampshire, United States, in July 1944. The Conference was organized by the allied nations in order to set out the financial architecture of the world after the war and it became the precursor of the two most important organizations, IMF & World Bank, which would set international trade and currency into motion. The two lead

[4] Such policy is also known as neighbor thy beggar policy. Such a policy is exactly acts like export subsidy (see, 2010 Report to Congress of the U.S.–China Economic and Security Review Commission One Hundred Eleventh Congress Second Session, 1, November 2010). However, it will not be better to treat this as an export subsidy because its impact is not merely limited to a sector of the economy.

negotiators[5], i.e. Harry Dexter White from United States and John Maynard Keynes from United Kingdom, prepared their independent plans for currency and exchange regulation, but of course the Bretton Woods conference was the story of dominance by White (i.e. United States), as mentioned earlier.

Both Keynes and White had a bright life history and they had made very important contributions in their respective area of excellence. White Born in 1892 in a Lithuanian family. He studied at Columbia and completed bachelor and master's degrees in economics from Stanford, and finally completed a Ph.D. from Harvard University. His thesis was widely acclaimed and recognized for his meticulous efforts. However, White's list of publications is quite small.[6] After spending a brief period in teaching he had the offers to become the chief economist in the Treasury in 1945 and finally to become the first U.S. Executive Director in the International Monetary Fund. He died of a heart attack in 1948.

On the other hand, John Maynard Keynes, born June 5, 1883, and known as the father of Keynesian economics (dealing with the causes of long-term unemployment). His father was also an economist and his contribution in the area of laissez-faire economics was remarkable. However, unlike his father, Keynes supported the government interventions in the private businesses.[7] After completing his BA and MA, he assumed a teaching job in Cambridge where he continued until 1915. During the period of World War – I, he joined Treasury in UK government. Long before the great depression, he had successfully predicted recession. 1937 he suffered a massive heart attack and afterwards he never had a good health condition. During the remaining nine years, he had written a lot on the wartime economics.[8] Before dying at the age of 62 years, he had negotiated last Bretton Woods for United Kingdom. According to his Russian wife Lydia, Keynes was "more than an economist." Keynes was also (at various times, often simultaneously) a civil servant, a collector of paintings and books, a speculator, a farmer, the begetter of British policy towards the arts (he created the Arts Council), and editor and publisher – and of course, a thinker of great originality.[9]

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[5] The Bretton Woods conference of July 1944 and the preparatory meetings held in Washington, D.C., in 1943 and early 1944 were attended by the leading economists of the era. These included, among others, James W. Angel, William Adams Brown, Jr., Edward M. Bernstein, Alvin H. Hansen, John H. Williams, John Parke Young, Emanuel A. Goldenweiser, and Harry D. White of the United States; John Maynard Keynes, Dennis H. Robertson, and Lionel Robbins of the United Kingdom; Leslie G. Melville of Australia; Arthur F.W. Plumtree and Louis Rasminsky of Canada; and Robert Mosse of France – see, Raymond F. Mikesell, The Bretton Woods Debate: A memoir, Essay in International Finance, No. 192, March 1994.

[6] James M. Boughton, American in the Shadows: Harry Dexter White and the Design of the International Monetary Fund, at 6, WP/06/6, IMF, 2006, *available at* http://www.imf.org/en/publications/wp/issues/2016/12/31/american-in-the-shadows-harry-dexter-white-and-the-design-of-the-international-monetary-fund-18764 accessed on 26.05.2018.

[7] John Maynard Keynes: Can the great economist save the world? Nick Fraser, Saturday 8 November 2008 01:00, *available at*https://www.independent.co.uk/news/business/analysis-and-features/john-maynard-keynes-can-the-great-economist-save-the-world-994416.html (accessed on 25th May, 2018).

[8] *Id*. (accessed on 25 May 2018).

[9] *Id.* (accessed on 25 May 2018).

Distinctions between the White and Keynes Plans for a Monetary System

White was in favor of a rule based monetary and exchange regulation system. However, simultaneously he was also in favor of keeping such rules flexible enough so that it could occasionally be controlled by the Central Banks. Hence, he preferred an exchange regime, which was to be "fixed but adjustable." He was also the supporter of gold scale and supported the notion of pegging value of dollar with gold, like most of the economists of that time. However, Keynes differed with White; he had proposed that the levels of interference should be fixed if Central Bank has to intervene for regulating the currency exchange.[10]

During the Bretton Woods negotiation, both Keynes and White developed independent plans. Both of them worked hard to promote the political and economic interest of their respective countries. Both of the plans contained the value as well as flaws. The Bretton Woods did not accept their plans as it was drafted by them. Rather the Articles of Agreement, that was the outcome of their plans, was the amended version of their plans.

There were the fundamental differences between the Keynes and White plans. White wanted to protect the American interests and it was always in his back of mind that only a multilateral regime[11] supported by the seamless trade could promote the interest of America. Contrarily, Keynes plan was more concerned about maintaining colonial preferences despite of the opposition by USA for such a system. Along with the multilateralism, the US authorities were also more concerned about establishing Dollar as an international currency. In response to the demand by the US governments, White came up with the Idea of World Bank and an ISF (i.e. International Stabilization Fund). On the other hand, Keynes was preparing a plan to create an ICU (International Clearing Union) which was to be prepared to challenge any possible dominance of Germany in the post war financial set up.[12]

The Keynes plan had several important technical advantages over the White plan, and these were frequently cited by the British delegation in the debates. First, under the Keynes plan, members could finance their deficits through the ICU; under the White plan, members acquired from the ISF the currencies of individual member countries to settle their bilateral deficits with those countries, but they could not use those currencies to settle deficits with third countries. This was so because ISF members were not required to make their currencies convertible into third currencies. A member might have an overall balance-of payments surplus and yet need to borrow a particular currency, but the White plan lacked a multilateral clearing mechanism by which to do so.[13]

British delegates were largely frustrated by the dominance enjoyed by the USA. Keynes proposals for the ICU was turned down because such system was not familiar to the

[10] Experience has shown that this approach of Keynes was very commendable but at the same time, it was very difficulty to implement, as the currency & exchange are the aspects of sovereignty. This must be seen in context of the ongoing US – China dispute of currency.

[11] For details, see James M. Boughton, American in the Shadows: Harry Dexter White and the Design of the International Monetary Fund, at 21, WP/06/6, IMF, 2006, *available at* http://www.imf.org/en/publications/wp/issues/2016/12/31/american-in-the-shadows-harry-dexter-white-and-the-design-of-the-international-monetary-fund-18764 accessed on 26.05.2018.

[12] Raymond F. Mikesell, The Bretton Woods Debate: A memoir, at 2, Essay in International Finance, No. 192, March 1994 (quoting Van Dormael (1978, pp. 5-6) at footnote no. 2).

[13] *Id.*at 13.

American financial system. Initially Keynes defended his plans of creating an ICU but perceiving the reluctance of the American delegation about ICU, later he tried to incorporate the ICU in White plans. [14]

Conclusion

Politics seems to have been an inherent part of the currency regulations. Before the Bretton Woods regime, there was no regulatory body for the international currency and exchange. Political clashes took place between UK and USA when they started negotiating Bretton Woods. Even now, the currency and exchange regime is not free from politics and diplomacy. IMF has made the efforts to infuse a rule of law as far as the currency and exchange system is concerned. There are many gaps in the currency and exchange regulations, which causes the participants, to have the opportunities to adopt manipulative currency practices instead of resorting to rule of law. IMF provisions relating to currency manipulations are vague and difficult to implement. "Currency manipulation" is nowhere defined in the Articles of Agreement of IMF. IMF has achieved major successes to handle the economy during the course of recessions. IMF successfully handled the various economic recession, which hit the world after World War – II, like East Asian recession of 1997 or 2008 general recession. It encouraged the member nations to adopt a cohesive policy to mitigate the impact of the recessions. However, the major challenge before the IMF is to deal with the insidious and sophisticated way of manipulating the currency, e.g. the issues like sovereign interference of prolonged devaluation of currency & exchange (as in case of China), quantitative easing (as in case of USA), zero interest rate (as in case of Japan) etc. Presently, there is no answer for such manipulative practices in the present IMF regime. Only an honest intent to do a fair business is the answer of such gaps.

[14] Id. at 14.

***The Intellectual Property Rights and Competition Law: A Comparative Analysis* (2015) By KD Raju, Eastern Law House Private Limited**

~Dr. Vidhi Madaan Chadda*

"*Continued innovation is the best way to beat the competition*."

- Thomas A Edison

Innovation and consumer welfare are the two ends which the intellectual property law and the competition law aim to balance and achieve. Even then the legal regimes of competition law and intellectual property law, *prima facie* appear to be in conflict with each other. This is so as both the regimes aim at promoting innovation, however the approaches wary in their application.

The book is premised on the research carried out upon the fellowship provided by Microsoft India (Private) Limited. The book is aptly segregated into six chapters which succinctly give a comparative overview of the issues emerging out of the interplay of the competition law and intellectual property rights.

Chapter *one* elucidated that the scope of the book is only to understand the interface between intellectual property protection and competition law. The chapter has given an overview of the book by giving a brief summary of the chapters to follow. In chapter *two*, the author has undertaken an intense deliberation of the possible clashes of the monopolistic intellectual property protection and competition law tools promoting market competition. However, it has been highlighted that the said fields of law have conceivable overlaps by reason of distinct system of rules and regulations governing them. Here, it is to be noted that both of these disciplines operate in the market with different purpose but with the same ultimate object of consumer welfare. The said similarity in the object, the author culminates the discussion by stating that there exist no clashes between the two disciplines of law. The study has pointed out that for the past few years various jurisdictions have witnessed several instances of conflict between intellectual property holders and competition regulators. This rationale has led the author to enumerate few objectives and hypothesis of undertaking the present study viz. to analyse the conflict between competition law and intellectual property rights in the backdrop of the developments taking place in the regulatory regime in the US and EU. The author emphasised that the work aims at proposing a comprehensive guideline for the Indian competition authority while dealing with the situation of conflict of the said two fields of law.[1] This chapter has also traced the historical antecedents of the evolution of competition regulation in India whilst tracing the developments that led to the enactment of Monopolies and Restrictive Trade Practices Act, 1969 and the circumstances that led to the shift in regime in the light of the implementation of New Economic Policy during 1990's. The chapter then delves into the present Competition law i.e. Competition Act, 2002 and points out how ill equipped the Competition authorities and the Indian courts are while addressing the hyper

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[1]K.D. RAJU, THE INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: A COMPARATIVE ANALYSIS 19-20 (2015).

technical and legal issues emerging out of this complex amalgam of economics, innovation and law.[2] Towards the end, the chapter has briefly set out the literature review on the subject.

In chapter three, the author has examined the growth and development of one of the earliest competition law regimes i.e. the United States, making the deliberation of over 125-year-old Sharman Act, 1890 inevitable for any competition law discourses. He has tried to encapsulate the journey of the intellectual property rights and competition law (read antitrust law for US) interface vide the judicial pronouncements which have shaped this field of law. The author has put forth an argument that whilst both the regimes share the common goal of promoting innovation and enhancing consumer welfare, however the clashes amongst them arises due to private rights and public interest. Wherein the intellectual property rights are the protectors of the private right and the antitrust laws aim at enhancing the social welfare. He has projected that the intellectual property and competition law interface in the US will become more blatant in the times to come, where on one hand the IP holders would fight for protecting their claim under the property and on the other hand the Federal Trade Commission will oppose such claim on the pretext of promoting competition in the market.[3]

Chapter four has analysed the relationship between intellectual property and the competition law in the European Union (EU). The EU law on competition has been premised in the Article 101 and 102 of the Treaty on the Functionality on the European Union. The chapter then delved into few significant pronouncements by the European Commission and the European Court of Justice on the interface of competition law and intellectual property rights like the Qualcomm case[4], Orange book case[5], Intel case[6]and the Microsoft case[7]. The chapter has also highlighted the similarity and divergence in the US and EU approaches in dealing with certain conducts like predatory pricing, refusal to deal and licence. The European Courts' view has been stated to be cautious so far in the sense that a formula has been devised to avoid possible interface in the intellectual property law and the competition law.

Analyses of the provisions of the Competition Act, 2002 dealing with the interface of intellectual property rights and competition law has been carried out in chapter *five*. The Competition Commission of India i.e. the regulator under the Competition Act, 2002 has initiated the investigations in the competition cases only in the recent past. The author has given an overview of the three substantive pillars of Indian competition law, namely prohibition of anti-competitive agreements (section 3), prohibition of abuse of dominant position by an enterprise (section 4) and regulation of combinations (section 5 and 6). Further, the main purpose of a competition law regime is to ensure that the enterprises do not maintain and abuse their dominant position in the market, while the intellectual property regime grants to a right holder an exclusive right qua their invention for a certain period of time. Section 3 of the Competition Act, 2002 prohibits anti-competitive agreements however sub-section (5) declares that nothing contained in this provision shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under the Copyright Act, 1957; the Patents Act, 1970; the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999 the Geographical Indications of Goods (Registration and

[2]One of the case law quoted here is *Micromax Informatics Limited* v. *Telefonakticbolaget LM Ericsson*, Case No. 50/2013 (CCI).
[3]*Supra* n. 1 at 112.
[4]*Qualcomm Wireless Business Solutions Europe BV* v. *Commission*, Case T-48/04.
[5] KZS 39/06
[6]*Intel* v. *Commission*, Case T-286/09.
[7]*Microsoft* v. *Commission*, Case T – 201/04.

Protection) Act, 1999; the Designs Act, 2000; the Semi-conductor Integrated Circuits Layout-Design Act, 2000. However, abuse by a dominant firm which has acquired such position by virtue of possessing an intellectual property right is prohibited under section 4. The author here quoted the Raghavan Committee report and stated that the intellectual property rights in all its forms have the potential of violating competition in the market.[8] The intellectual property rights, for the purposes of competition law is to be equated as any other tangible asset. Hence it is affirmed that the Competition Commission of India has the power to deal with the cases pertaining to intellectual property rights.[9] The author in this chapter has reviewed the jurisprudence developed so far by discussing the three cases that emerged before the Competition Commission of India on the issue of competition and intellectual property namely *Singhania and Partners LLP* v. *Microsoft Corporation (India) Private Limited*[10]; *Amir Khan Productions Private Limited* v. *Union of India*[11] and *Micromax Informatics Limited* v. *Telefonakticbolaget LM Ericsson*[12].

The last chapter i.e. *sixth*, concludes the study by summarizing the position and development in the field of law in the US and EU. The author here has justified the comparative approach by asserting that such perspective has by far has helped in drawing up a comprehensive guideline for the Indian competition authorities while dealing in the cases involving intellectual property and competition law. He has avowed that although the US, EU and Indian competition regime are premised in the different social, economic and political set ups but still have few commonalities. For instance, the goal of US antitrust law is consumer welfare whereas for EU competition law the prime object remains economic integration. The Indian competition law jurisprudence while taking cues from these mature jurisdictions must promulgate its own set of practices and procedures. For the said, the author has culminated the result into few guidelines for the Indian competition authorities to adhere to when faced with the challenges of competition law and intellectual property rights.

On the whole, the research is a praiseworthy contribution in the times when the jurisprudence and the literature on Indian competition law is in its nascence stage, where there is rarely any edition on this intricate aspect of competition law so far in India. Further, the comparative approach adopted by the author to analyse the interplay of competition law and intellectual property rights is commendable. The learnings drawn by the analysis of the regulatory framework present in the two mature jurisdictions i.e. US and EU would invariably of great help in drawing up the regime for the Indian competition authorities, practitioners and the researchers.

The book has been supported by a strong list of references and discusses extensively the cases pertaining to the subject decided across jurisdictions viz. US, EU and India. This laudable work carried out by the author will go a long way in filling the much-needed gap in the literature in the said field. The book will cater to highlight valuable insights in this aspect of law to the academia, practitioners and the legal fraternity at large.

[8] *Supra* n. 1 at 205.
[9] *Amir Khan Productions Private Limited* v. *Union of India*, 2010 (112) Bom LR 3778.
[10] Case No. 36/2010
[11] 2010 (112) Bom LR 3778
[12] Case No. 50/2013

Ease of Doing Business and Public Private Partnership Projects in India

~ **PALLAVI KHANNA***

ABSTRACT

PPP projects can be defined by the construction and operation of infrastructure projects by the private sector which is usually provided by the government sector. In developing countries, there is a great need for investment of the private sector in infrastructure projects due to the paucity of advanced technology and shortage in public funds. It is because of this that the governments have started inviting the private entities to participate in long term contracts for financing, operation and construction of infrastructure projects that are capital intensive in nature. The participation of the private sector adds value to different stages of the project in the form of innovation, managerial efficiency, improved technology, etc. [13]

Through this paper, the author aims to trace the legal developments which have taken place in the domain of PPP in infrastructure projects in India since 2010. While doing so, an attempt has been made to focus on aspects such as problems arising in infrastructure projects, need for PPP in India, the government initiatives, Swiss challenge, etc. The author concludes with recommendations on how to improve the existing PPP framework in India.

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[13] DEVELOPING INDIA'S INFRASTRUCTURE THROUGH PPS- A RESOURCE GUIDE, (2008), *available at* https://www.cityoflondon.gov.uk/business/support-promotion-and-advice/promoting-the-city-internationally/india/Documents/PPPResourceGuideIndia.pdf

INTRODUCTION

PPP projects go through a number of stages. First the public sector entity defines which service it intends to procure by prescribing the parameters and conceptualising the project. Then a technical and financial feasibility study is conducted to find a private partner who is financially competent by a bidding process. After securing the necessary approvals, a long term contract is devised that distributes the risks and rewards before finally setting up a special purpose vehicle to undertake the project.

India has been hailed as one of those countries with a lot of experience in PPP. It uses this model of infrastructure development extensively. The Planning Commission, vide its 12th plan has set a target of achieving 50% private and PPP funding in the total investments in infrastructure in comparison to the 30% which was proposed in the 11th plan. Though roads and highway projects were the popular sectors for PPP, there have also been investments in new areas such as education and healthcare.

A lot of focus has been put on capacity building for PPPs to develop in India through model agreements, guidelines, cells, training programs, etc. Setting up independent regulatory authorities, dispute resolution agencies, expediting clearances, selecting high quality consultants at reasonable costs, independent audits and revising agreements in favour of concessionaires is required to make the PPP model successful.

GOVERNMENT INITIATIVES

In the absence of central laws, some states took the initiative of making and developing their own policies and guidelines for PPPs. Though the policies are not legally binding like legislations, they serve the same purpose. States have been successful while implementing the PPP model by identifying regulatory frameworks that lay down the nature of facilities, governing authorities, scope of private sector participation, and procedural requirements. Some state governments also have separate policies for different sectors such as power policy, road policy, etc. The state policies aim to expand private investment in infrastructure and establish the state as a role model for development.[14] They apply to different sectors, identify new projects, decide on nature of government support and lay down timelines with which clearances must be obtained. Some states have also set up infrastructure development boards. [15]

[14] *Building Capacities for Public Private Partnerships in India,* WORLD BANK (2006)

[15] Example-

- The Andhra Pradesh Infrastructure Development Enabling Act, 2001
- The Assam Policy on Public Private Partnership in Infrastructure Development
- The Bihar Infrastructure Development Enabling Act, 2006
- The Goa Policy on Public Private Partnership
- Gujarat Infrastructure Development Act (1999) (amended in 2006)
- The Karnataka Infrastructure Policy, 2007
- The Orissa PPP Policy, 2007
- The Punjab Infrastructure Development and Regulation Act, 2002
- The West Bengal Policy on Infrastructure Development through Public Private Partnership, 2003
- Tamil Nadu Transparency in Tenders (Public Private Partnership Procurement) Rules, 2012
- The Tamil Nadu Infrastructure Development Act , 2012

The Government of India, with the assistance of the Department of Economic Affairs and the Ministry of Finance is responsible for structuring and developing PPP projects across the country. Earlier the central government came up with initiatives such as standardising bidding documents[16], setting up of India infrastructure Finance Company Limited[17], India Infrastructure Project Development Fund[18], Public Private Partnership Appraisal Committee[19], PPP Cells[20], etc. In order to promote transparency and develop financing structures, the government thought of streamlining the approvals, standardising the qualification and bidding systems, developing a viability gap funding mechanism[21] and providing long term finance through IIFCL.

In 2013 the Guidelines for giving financial support to PPPs in infrastructure were released. They deal with aspects such as institutional structure, appraisal and approvals, viability gap funding, call for bids, final approvals, disbursement and monitoring.[22] The government also notified Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects which also dealt with project development through identification, consultation, approval, documentation, bidding, etc. [23]

In 2009 the amended model RFQ was published with information pertaining to instructions for applicants, bidding process, documents, application, etc In 2010 the Model RFP was proposed which encompassed aspects such as technical, legal and financial feasibility, work expectations, transparency in selection, timeline, draft agreements, eligible projects, bidding, flexibility, etc. The scheme for supporting PPPs in infrastructure was expanded to include more sectors such as LNG, pipelines, telecom, irrigation, agricultural infrastructure, soil testing, SEZ in 2012 and health, skill development and storage in 2011.

Some of the new efforts include – allowing longer concession periods, easing the ECB norms, allowing FDI upto 100% in some infrastructure projects, bearing of cost for land and preconstruction by the government, tax concessions for development activities, etc. The national PPP Capacity Building Programme was held in 2010 to promote trained individuals. The government has adopted standardised documents for awarding PPP projects. Further,

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- The Tamil Nadu Infrastructure Development Board Regulations , 2013
- The Uttarakhand Public Private Partnership (PPP) Policy - 2012 (Draft)

[16]See Model Concession Agreement for Highways at http://nhai.org/Doc/14june16/PPP1_20160614184330.pdf

[17] The India Infrastructure Finance Company Limited was also created for giving long term financial aid for the projects being undertaken.

[18]The India Infrastructure Project Development Find gives resources to the governments at urban and state level for hiring consultants to frame PPP proposals.

[19] The PPPAC is set up at the central level under the DEA and is involved in the approval and appraisal process for streamlining PPPs. Generally these projects are sponsored by the concerned ministry of the central government such as Ministry of Railways or Shipping, etc. or by the public sector undertakings at the Central level which then submit the proposal before the PPPAC to get clearance. Once it gets the approval, the request for qualification and request for proposal is issued.

[20] The PPP cells established in 2007 to act as nodal agencies for receiving proposals for PPPs and placing them for approval before the single window agency. The cell also acts as a help center for state departments in different stages of the project cycle.

[21]The Viability Gap Funding scheme is a special facility that was created for supporting projects that were economically justifiable but not considered to be commercially viable in the near future.

[22] http://nhai.org/Doc/14june16/PPP1_20160614184330.pdf

[23]*Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects*, 2013 issued by GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF ECONOMIC AFFAIRS.

agencies have expedited the decision making process so it is done in a fair and competitive manner. Multiple cabinet committees were set up to fasten the investments. There was a cabinet committee on infrastructure, cabinet committee on investment and the cabinet committee on economic affairs (CCEA). The government has dedicated a website that acts as a repository of information related to PPP projects. It provides details of national and state projects and the various stages.[24] There is also a dedicated PPP toolkit available for procuring entities.[25]

In order to address some concerns, the Government came up with the Public Procurement Bill in 2012 and the Draft PPP Rules, 2011. The national draft policy outlines the different stages of infrastructure projects- identifying, developing, procuring, managing contracts and monitoring.[26] The draft rules for PPP came in 2011 and seek to assist the government and private investors by undertaking PPP in a streamlined manner to achieve value for money through optimal risk allocation, sufficient monitoring, developing governance mechanisms for promoting competitiveness and transparency. The draft rules of 2011 have been framed to define the procedures for procurement of PPP projects, to guide government officers in structuring and decision making in relation to PPP projects. The Draft Policy sought to lay down the main principles to be followed for implementing projects. It underlined the belief that the projects have to be developed keeping in mind of the end users, affected parties and other stakeholders in different sectors. However, it doesn't explain how it seeks to achieve inclusive growth through PPPs. Though transparency enhancing measures can be inculcated in the design and implementation of PPPS so that it is a more consultative process, the policy only focuses on the bidders engaging in procurement. The Policy goes on to explain the different stages involved in launching the PPP projects. It proposes a system of publishing mandatory disclosures or fair practices which the PPP projects need to abide by. However it doesn't state who is responsible to ensure that these disclosure requirements are complied with. The decision making process at the ministry level must be equipped with transparency building mechanisms to truly realise the objective of inclusive growth so that these ideals of fairness are instilled from the very inception of PPP projects. The identification of PPPs should involve all stakeholders and especially those whose home and livelihood is at the risk of being displaced. The Draft policy clarifies that the responsibility is not exclusively that of the private entity but it should be borne by the relevant ministry which must identify the projects under it'splan and prescribe the stake of private investors in the projects. The Draft doesn't mention direct involvement of people in project identification or monitoring. With respect to the development stage, the policy describes is as that entailing m structuring, preparing contracts, obtaining clearances, etc this information being internal to the government must be made accessible to the public through the RTI. [27]

The Procurement Bill, 2012 applies to all government contracts falling within a certain benchmark. The Bill gives a framework for procuring goods and services by PPPs. It also sets forth grievance redressal mechanisms in case private bidders face problems relating to procurement. The Bill provides that the CAG will audit the books of accounts of the concessionaire if the procuring entity puts forth a request regarding the same. A Central

[24] See PPP PROJECTS IN INDIA: A COMPENDIUM OF CASE STUDIES,*available at* https://www.pppinindia.gov.in/documents/20181/27199/Compendium_July8.pdf/74f766db-c9ba-4ff9-8492-a0ff4493103f

[25] https://www.pppinindia.gov.in/toolkit/ports/module1-racfopd-mriip.php?links=risk1a

[26]Also, see DELIVERING PRIVATE SECTOR EFFICIENCY WITHIN PUBLIC LAW PRINCIPLES, *available at* http://indiacorplaw.blogspot.in/2015/04/delivering-private-sector-efficiency.html

[27]Draft National Public Private Partnership Policy, 2011.

Public Procurement Portal is proposed to be set up so it is accessible to the public and can be used to post notices about public procurement. Since PPPs are also a kind of public procurement, the bill applies to PPPs too. Unlike the Draft Policy, the procurement Bill restricts PPP projects to those exceeding five years. Moreover, it doesn't include those contracts which don't entail provision of good or services on user charges such as construction or maintenance contracts. [28]

In 2012 Guidelines for an Institutional Mechanism for Monitoring Public Private Partnership Projects were released to ensure that the concession agreements are complied with and the interests of public exchequer and users are safeguarded. These guidelines attempt to enforce the duties of the concessionaire for better quality services in the interest of the public. The institutional framework proposed thereunder envisage a two tier mechanism for monitoring PPP projects. They intend establishing a monitoring unit at the project level and a PPP Performance Review Unit at the state government level. This would be accompanied by monitoring reports for every project, detaining, compliance with terms, timelines, performance review, remedies available and penalties. Non compliance with the agreements were to be reported to the respective ministries every quarter which would be reviewed by the Cabinet Committee on Infrastructure.[29] A Project Monitoring Group was also established in 2013 which worked under the Cabinet Secretariat so it could monitor and expedite the PPP projects which were stalled. It also helped in digitising the applications for environment clearances.

A number of financial initiatives have also been taken to promote PPPs. Loans given to user based PPP projects were to be considered as secured advances for boosting infrastructure financing. ECB norms were relaxed to attract overseas funding by allowing bridge financing under the automatic route and increasing time frame for borrowings by infrastructure companies. With respect to refinancing of loans, the repayment period is to be fixed by accounting for the life of the project, related cash flows and after getting lenders approval for viability of the project.[30]

In 2013, the RBI issued a Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning of Advances. Under this, it was stated that majority of the infrastructure projects were user-based and there were model concession agreements being adopted by various Ministries for their PPP projects which provided comfort to lenders with respect to security of their debt. Hence, in light of this, the debts owed to lenders were to be regarded as secured to the extent that the project authority so assured in terms of their concession agreements and as long as it met some conditions such as- keeping user charges in escrow accounts while giving priority to senior lenders over withdrawals, having adequate risk mitigation mechanisms such as extended user charges or concession periods if revenues fall below anticipated levels, giving lenders the right of substitution in the event of default by concessionaire and also allowing them to seek termination in case of failure in debt servicing, and compulsory buyout in addition to debt repayment as decided by the project authority on termination. [31]

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[28] Public Procurement Bill, 2012

[29] http://planningcommission.gov.in/sectors/ppp_report/reports_guidelines/Guidelines%20for%20Monitoring%20of%20PPP%20Projects.pdf

[30] G. Singh et al, *RBI Permits Long Term Structuring Of New Long Term Project Loans To Infrastructure And Core Industries,* SCC ONLINE, (2014) PL (CL) December 60.

[31] *Prudential norms on Advances to Infrastructure Sector,* RESERVE BANK OF INDIA, 2013

In 2014, the Department of Economic Affairs came up with a report on a Framework for Renegotiating PPP Contracts. This came following the belief that there was a general consensus that the model concession agreements are inflexible in nature and their terms cannot be changed apart from when there is a change in law or in case of force majeure events. The report analysed the issues relating to amendment in detail and concluded that the contractual and institutional framework needs to be altered so that the government can amend the agreements easily according to materiality, financial costs, risk assessments, adversity of consequence, public economic benefits, etc. The report also referred to the mechanism in Chile where autonomous technical experts are used to avoid disputes. The report further suggested that the bid evaluation system needs to be changed so that financially underwritten bids are only allowed and speculative bids are ousted. In 2015, the PPP Cell also published Guidelines for Post Award Contract Management.[32]

The Land Acquisition Act, 2013[33] applied to PPP projects as well since government was involved in acquiring land though the ultimate goal was to transfer it for being put to use by private companies carrying out the stated public purpose.[34] For PPP projects, consent of 75% of the affected families was needed.[35] Under the 2015 Land Acquisition Law[36], some categories including PPP projects with government owning the land were exempted from the requirements of the social impact assessment and consent clause. This exemption meant the term 'public purpose' was expanded and the discretionary powers of the government to acquire land were increased at the cost of the farmers and landowners. [37]

In the budget for 2016-17 also a reference was made to PPP projects in India. The budget suggested provision of a legal framework for the purpose of renegotiation and dispute resolution of contracts involving PPP and public utility services. It also allowed service tax to be partially exempted for affordable houses being constructed under any government or PPP scheme. In order to revitalise PPPs it was suggested that Public Utility Dispute Resolution Bill, guidelines for renegotiating PPP concession agreements and new credit rating systems be introduced.[38]

PROBLEMS FACED BY PPP PROJECTS

PPP projects are complex in nature because multiple parties are involved and risk sharing problems often occur. This means that there are coordination failures between the agencies

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Also, see Master Circular - *Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances,* RESERVE BANK OF INDIA, 2013

[32] See https://www.pppinindia.gov.in/documents/20181/33749/Guidelines+on+Post+Award+Contract+Management+of+PPP+Concessions/75c24213-59c6-44df-a874-8485066ef97a

[33] RFCTLARR, 2013

[34] See Analysing Developments Impacting Business- Infrastructure by Khaitan& Co, (2013) PL (CL) December 58

[35] Some states such as Tripura had a lesser consent requirement of 70% of affected families under the Tripura Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Rules, 2015

[36] RFCTLARR,2015

[37] *Land Acquisition Law May Be Eased For PPP Projects,* THE BUSINESS STANDARD,*available at* http://www.business-standard.com/article/economy-policy/land-acquisition-law-may-be-eased-for-ppp-projects-114110401375_1.html

[38] See Budget 2016- 17, at http://indiabudget.nic.in/ub2016-17/bh/bh1.pdf

involved. It is difficult to procure long term finance for these projects[39]. Moreover, the public and private sector do not have adequate capacity to prepare or implement PPP contracts or to meet the technical and financial requirements of these projects. It is also hard to fulfil both the goals of private sector and public sector involved in the PPP project together, i.e. earn profit and do public service. Apportioning risk in a manner that is fair and rational is difficult. The existence of red-tapism along with the lack of development in innovation creates a wide gap between the demand and supply of infrastructure projects. The scope of renegotiation tends to be in favour of private players and this is not appreciated by the other parties.[40]

There are still some challenges faced in implementing PPP projects in India. Since there are various problems at each stage, project developers show reluctance in bidding. This translates into the projects not being considered bankable and hence they don't get started or attain financial closure. The procurement process which is slow as well as costly is blamed for this. The private sector is also wary since an unproportionate amount of risk gets transferred to it. The inflexibility of the model contracts make it further difficult. Moreover, there is multiplicity of approvals because a number of authorities are involved, the process is complex and law and order problems also arise. There are disputes between the concessionaire and authority which are never ending. The lack of a uniform law creates most problems. [41]The PPP projects hence suffer from lack of uniformity in policies and guidelines. The 2013 Land Acquisition law further created confusion since ' public purpose' was not defined and there was an onerous condition requiring the consent of 80% landowners.[42]

Model concession agreements were devised to reduce the time consumed in preparing project documents, bridging the knowledge gap in urban services so lack of expertise in farming PPP agreements doesn't lead to losses and so that private sector can build effective strategies while bidding so that proper risk allocation takes place. However even this came up with some disadvantages. The government agencies were implementing the MCAs directly without allowing appropriate customisations and without a proper understanding of the content of the documents. This meant that projects were structured poorly and there was confusion that risks were taken care of ex-ante. This left the government departments ill-equipped to deal with the problems faced as projects progressed. For instance, in the Alandur sewage treatment project which was a PPP, the municipality was not aware of the contract provisions dealing with last mile connectivity and were unable to meet their obligations.[43]

There has been some debate about promoting PPPs in smart cities as well. PPPs provide a number of opportunities for developing smart cities by participating in water supply, waste management, social services, transport, housing, vocational training, etc. However there are a number of challenges which prevent smart cities from being successfully developed by PPPs. Firstly, there is no globally recognised definition of a smart city and India itself doesn't have a policy for urbanising through PPPs. In addition to attracting private capital, there is concern about land acquisition since the land involved tends to be that belonging to villagers who may resist parting with it or ask for high prices. Lack of coordination amongst agencies, lengthy

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[39] P. Yadav, IDENTIFICATION AND IMPLICATIONS OF RISK FACTORS IN PUBLIC-PRIVATE-PARTNERSHIP PROJECTS, *available at*http://nlujodhpur.ac.in/uploads/5951605161123.pdf

[40]V.Chatterjee, *Renegotiating PPP Contracts*, THE BUSINESS STANDARD, *available at* http://www.business-standard.com/article/opinion/renegotiating-ppp-contracts-113052000963_1.html

[41]R. Singh, *Delays and Cost Overruns in Infrastructure Projects: Extent, Causes and Remedies*, vol. 15 (21), ECONOMIC AND POLITICAL WEEKLY (2010)

[42] G. Nataraj, *Challenges in Infrastructure Projects: The Role of Public Private Partnerships*, OBSERVER RESEARCH FOUNDATION (2014)

[43] A. Mahalingam & J. Seddon, PPPS IN URBAN INFRASTRUCTURE IN INDIA (2012)

procurement and approvals processes, instability in government policies and rigid agreements create further hurdles.[44]

SOME IMPORTANT CASES

Following certain procedural irregularities due to insufficient tenders, in the selection of a bid, a call for fresh bids was made. The initially selected developer challenged this and the High Court allowed this by quashing the decision for redetermination. It was held that the BEC had the right to reject and accept bids and the high court had no power to interfere in this.[45]

In another case there was an order for allotment of land by a state government. This was challenged as being illegal. It was found that the private entity had entered into a joint venture agreement with the state fir developing that land. An examination of the project features revealed that the allotment was done in line with public interest and could promote development and employment in the state. The procedure for selection had complied with all criteria to ensure transparency. Hence the allotment was done after a proper analysis and was valid. [46]

In the *Reliance case*[47] the tenders for privatising the Delhi and Mumbai airports were challenged. While upholding the privatisation, it was held that the court is not equipped to review administrative decisions. Moreover, it said that the terms of tender cannot be put under judicial review since it falls within the realm of contract and decisions are arrived at after several negotiation and expert consultations. The government should have the freedom of contract and their decisions must be tested only from standards of reasonableness. Though tenders give government discretion, it must be a consequence of judicial thinking. Hence the grant of projects to GMR and GVK were upheld.

In *Tata Cellular v. Union of India*[48], the apex court held that judicial review should only apply when government bodies are exercising contractual powers so that there is no arbitrariness. Moreover, it noted that the government has discretion in rejecting tenders but it must abide by principles under Article 14 of the constitution since the right to choose is not an arbitrary power.

THE SWISS CHALLENGE

The Swiss Challenge Route refers to that where the private party takes its proposal to the government. On the basis of the proposal received, the government has to release the tender. If it receives better bids then the private party which had initiated the project will have the

[44]Amirullah, *Prospects of Smart Cities Development in India through PPPs,* vol.4 (1), INTERNATIONAL JOURNAL OF RESEARCH IN ADVENT TECHNOLOGY (2016)
[45]State of Uttar Pradesh and Ors. Vs. AL Faheem Meetex Private Ltd. and Ors., AIR 2016 SC 953
[46]Pathan Mohammed Suleman Rehmatkhan Vs.State of Gujarat and Ors(2014) 4 SCC 156
[47] Reliance Airport Developers (P) Ltd. v. Airports Authority of India, (2006) 10 SCC 1
[48]Tata Cellular v. Union of India AIR 1996 SC 11

right of first refusal over the project.[49] The Government's Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projectsdo not exclude the submission of unsolicited proposals expressly but generally the procedure is based on competition envisaged amongst multi bidders so that there is greater transparency. [50]However, it seems that the government had permitted unsolicited proposals for special procedures at a point of time but this was withdrawn and replaced by competitive procedures when infrastructure projects were involved. The courts upheld the validity of this method and suggested that when the Swiss approach is followed then the authorities must clearly mention the kind of project, it's timelines and publicise in advance how the project will be awarded. [51]

The Planning Commission had in fact advocated this method in higher education, social sector and coal/ ignite industry projects. However, all recent model agreements by the commission state that selection will be done by a open and competitive process. Indian states follow their own procurement process and most of them allow unsolicited proposals for PPPs. Gujarat was the first state to implement to the Swiss Challenge procedure. The Gujarat Infrastructure Development Act of 1999 provided that a contractor may be selected by direct negotiations by permitting receipt of private proposals provided that government subsidies were not needed for assisting the project. Moreover, the unsolicited proposals were to be examined by the government from all aspects and then competitive bids could be invited. The original bidder could be given a month's time to match the best offer before the final selection. The Andhra Pradesh Infrastructure Development Enabling Act, 2001 allowed adopting this method as well but only in limited circumstances- where the government was providing asset support, where financial incentives were to be provided and where the developer had exclusive rights conferred on him. The private sector participants can submit unsolicited proposals whereupon a capability assessment of the original proposal alongwith the technical and commercial feasibility study is to be done. The concessionaire authority can then invite competing offers to counter the proposal and the original proposer is given a chance to meet the offers which may be greater than his proposal. However, the act doesn't provide necessary details like time frames within which these proposals will be considered, etc.The guidelines for procurement in Karnataka state that all proposals submitted must be examined for ascertaining if they fall within the ambit of the development plans laid down by the authority; if the proposal is innovative and *suo moto*; if a competitive bidding process is incapable of establishing a public need for such a proposal; if there are any similar projects being implemented for the same purpose. The objective behind allowing unsolicited proposals is to expedite the projects and stimulate innovation. The regulations require the criteria for awarding to be expressly stated such as minimum concession period, quality of service, highest revenue share, etc. [52]

In order to make the Swiss method work, firstly, countries must make an express provision allowing or barring them in their procurement rules. Secondly, there must be detailed information given in the procurement guidelines about preferred quantum, permissible extent of negotiations, etc. Thirdly, unless the unsolicited bids are related to innovative projects, they should not be allowed. Fourthly, there must be a public declaration to the effect that

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[49]P.V. Iyer, *The Swiss Method Is Innovative But There Are Challenges In The Indian Context,*THE INDIAN EXPRESS, *available at* http://indianexpress.com/article/explained/the-swiss-methodis-innovative-but-there-are-challengesin-the-indian-context/

[50]See REPORT ON STUDY ON COMPETITION CONCERNS IN CONCESSION AGREEMENTS IN INFRASTRUCTURE SECTORS (2009), *available at* http://www.cci.gov.in/sites/default/files/ConAgreInfraSect_20100401141506.pdf

[51]S. Verma, *Competitive Award of Unsolicited Infrastructure Proposals: A Recent Supreme Court Verdict Unveils Fresh Opportunities for Procurement Reform in India,*SCC ONLINE, 2010 PL June 16

[52]*Id.*

competitive methods will be unsuitable for a given acquisition so that competitors know that there are sufficient reasons to allow this and adequate mechanisms for challenging this before a designated agency must be provided. Fifthly, government involvement must be barred in project development when unsolicited proposals are used. If government participation is necessary then the government must give equal assistance to competitors for developing their responses. Sixthly, the competitors must be informed of the public resources that can be claimed from the public sector partner for assistance in financing. Seventhly, unsolicited bids should not be received when an RFP has already been announced. Hence only when the projects are not being contemplated by the government, then unsolicited bids can be allowed. Eighthly, reasonable time must be given for counter proposals in comparison with the time consumed by the original proponent. Ninthly, the invitation for counter proposals must be as detailed as that was given in the original RFP so potential competitors can make meaningful offers. Finally, there must be stringent obligations on the original proponent for performing the projects within the proposed timelines so as to avoid unscrupulous bidders seeking to gain undue advantage by subletting these rights.[53]

In a case where the validity of the tender process was in question, the petitioner sought to challenge the tender issued by the respondents for software development. It was held that the court can exercise scrutiny over contracts awarded by government agencies under judicial review in order to prevent bias but only in cases of patent illegality and impropriety by the employer. Hence if the management wishes it can give up it's decision of taking the Swiss challenge route and take up another proposal if it is in the interest of the project. Thus if there is no male fide involved then the court cannot review the tender process undertaken.[54]

The Supreme Court, while acknowledging legitimacy of unsolicited bids, directed that they should meet some basic requirements of transparency and competitiveness by seeing that the Swiss challenge method proposed to be adopted, type of potential projects, authorities which may approached, project areas that may be considered, rules regarding timelines for approvals, etc are all notified in advance so that interested parties are given a fair chance to compete.[55]

KELKAR COMMITTEE REPORT

The fiscal year 2014-15 witnessed a loss of momentum in terms of attracting private investments in PPP projects due to the red tapism bureaucratic hurdles, lack of clarity in PPP policies and the loopholes in the existing framework. [56]In order to address these problems, the Government of India had established a committee lead by Dr. Vijay Kelkar, (Kelkar Committee) which was responsible for reinventing the PPP model. [57]

[53] S. Verma, *Government Obligations in PPP Contracts*, vol. 10(4), JOURNAL OF PUBLIC PROCUREMENT, 2010

[54]Radiant Info Systems Limited represented by its General Manager Vs. The A.P. State Road Transport Corporation, represented by its Vice Chairman and Managing Director and Ors MANU/AP/0827/2010

[55]Ravi Development v Sri Krishna Pratishthan 2009 7 SCC 462

[56] R. Nair, *Kelkar Committee To Propose Overhaul Of PPP Framework In India,* LIVEMINT, *available at* http://www.livemint.com/Politics/3IVTZPorYq1iHW11cnpgaJ/Kelkar-committee-to-propose-overhaul-of-PPP-framework.html

[57]Also *see*, M. Agarwal, *How to Revive PPP Model in India,* THE HINDU BUSINESS LINE*available at* http://www.thehindubusinessline.com/opinion/how-to-revive-the-ppp-model-in-india/article7797268.ece

The Kelkar Committee focussed on ways to solve problems that arise in PPP projects and made recommendations on what needs to be done to strengthen the existing infrastructure so that there is proper risk management, better quality of service, etc. They suggested renegotiations, focussing on quality rather than pure fiscal gains, amending government policies and formulating specific PPP laws for easing procurement. Their recommendations include - expediting the PPP investments, amending the Prevention of Corruption Act, 1988 so that there is a distinction in the treatment for mala fide acts of government officials and the genuine errors. [58]They also suggested strengthening governance through research and capacity building initiatives. Setting up independent regulators was also proposed. Further, they said that model concession agreements must be issued when 80% land has been acquired. They noted that PPP should be discouraged for small projects since costs tend to exceed the benefits. They committee felt that information asymmetries were created in the market due to unsolicited proposals and hence were against the Swiss challenge method. They vehemently opposed allowing PSUs from participating in the bidding since it would defeat the purpose of PPP if this was allowed. In order to mobilise capital for the long term at low costs, they suggested issuing discount or zero coupon bonds. Finally, they were of the view that a national PPP policy must be published. [59]

CONCLUSION AND RECOMMENDATIONS

Infrastructure projects in India suffer from large financing gaps which can be bridged through investments by foreign and private sector. Bidding should be done by competitive methods only instead of opting for unsolicited proposals whenever possible. Attempts should be made for broadening the sources of financing. The model agreements must be customised when the project requires. Foreign investors should also be encouraged by offering more returns. Bureaucratic hurdles should be cleared to enable efficient development.

In order to increase transparency, all modifications made to PPP contracts after being awarded for implementation, should be made available to the public alongwith reasons for the changes made. There must be mandatory disclosures as well.[60] The jurisdiction of the information commissions must be recognised in the concession agreement. In order to assess performance of PPP projects, the social audit mechanisms already in place can be suitably modified for these projects. Information pertaining to bids must be accessible to bidders and interested parties through the government websites. All clearances received must be publicised as well.

There is strong support in favour of permitting renegotiations and a number of recommendations have been made in this regard. It has been suggested that the amendments in the model concession agreements should be capable of alteration and approved by the relevant authority if there are material changes from the original agreement. This approval may be given based on objectively assessing the costs and benefits. Apart from value for

[58] See http://www.thehindu.com/business/Economy/panel-refuses-swiss-challenge-wants-changes-in-corruption-law/article8037615.ece

[59]REPORT OF THE COMMITTEE ON REVISITING & REVITALISING THE PPP MODEL OF INFRASTRUCTURE DEVELOPMENT CHAIRED BY DR.V.KELKAR , *available at*http://pib.nic.in/newsite/PrintRelease.aspx?relid=133954
Also, see http://www.financialexpress.com/economy/kelkar-panel-suggests-easy-funding-for-ppp-projects-in-infra-sector/184750/

[60]See, A FRAMEWORK FOR DISCLOSURE IN PUBLIC PRIVATE PARTNERSHIP PROJECTS BY THE WORLD BANK, *available at* http://pubdocs.worldbank.org/en/773541448296707678/Disclosure-in-PPPs-Framework.PDF

money, the contribution of the state must be limited in case of payments arising in the course of amendment. The MCAs must be examined after consulting with experts and PPP practitioners so that they are in consonance with international standards on matters like compensation, land, refinancing, economic changes, etc. Dispute resolution can be made sector specific as well by having technical experts for each field involved in the settlement process. The bid evaluation criteria should be made more stringent so that the bids with higher involvement of lenders are allowed and those that do not meet commercial expectations are filtered out.

A number of solutions may be adopted to resolve the problems faced. There can be a centralised procurement system like there is in Canada, in addition to training of bureaucrats. The agreements must be made flexible so that they can be altered to meet the changing needs of different infrastructure projects and especially those having a long concession period. The public sector should also retain and manage risks by taking a greater burden than the private entity. By instituting a single window clearance system, the approvals and authorisations can be streamlined. Special courts may also be set up to speed up the dispute resolution process. Having detailed disclosures will enable transparency by ensuring fiscal implications are in the open. The government needs to be more proactive in promoting PPP in different sectors such as transport where it is still not used to it's maximum potential. Finally, if the PPPs are legitimised then this will automatically bring confidence in the private sector. It will encourage them to enter into contracts with the government for PPP investments so that the existence of a formal apparatus for dispute resolution that protects their interests raises their faith in the system. Thus, there must be a thrust towards developing a legislation for using PPPs.

COMPETITION REGULATIONS AND CORPORATE GOVERNANCE: A CONUNDRUM FOR INDIAN COMPANIES

~SHWETA DESAI[*] AND KUMKUM SHAH[**]

ABSTRACT

Corporate governance and competitive business environment share a close nexus wherein the competition regulations influence and impact the corporate governance practices in a company while corporate governance practices try to help the companies to meet with the challenges of the competition in the business. So basically complying with competition regulations in corporate governance practice and stay clear of indulging in anti- competitive practice is a sine qua non. In this paper an overview of the concept of corporate governance, competition, the general legislative history, regulatory framework of corporate governance as well as under competition act along with the interface between corporate governance and competition act is given in a detailed form. The main aim is to study and understand the inter-link between competition regulations with corporate governance, and the interface between these two streams of law explaining how the task of maintaining the balance between both is essential for the functional working of organizations.

Corporate Governance is a set of policies that are formed for analyzing and deciding the performance of the company keeping in mind the competition regulations that are prevalent in the market. The paper will discuss the corporate governance along with competition regulations from India's point of view. It will also analyze the barriers that an emerging economy like India has to go through. In addition, it will also explain liabilities of directors under Indian competition regime with the relevant provisions under corporate governance.

Finally the need for good corporate governance is discussed when competition is lower in the market and but the top managers of the company still face the challenge to maintain the position of the company in the market.

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CHAPTER I

INTRODUCTION

Corporate governance and competitive business environment share a close nexus wherein the competition regulations influence and impact the corporate governance practices in a company while the corporate governance practices try to help the companies to meet the challenges of the competition in the business. So basically complying with competition regulations in corporate governance practice and stay clear from indulging in anti-competitive practice is a sine qua non[1]. In this chapter the authors are going to provide with an overview of the concept of corporate governance, competition and the general legislative history. Corporate governance in simple words is to maximize the shareholder value in a corporation while ensuring fairness to all stakeholders i.e. customers, investors, employees, the government, vendors, and the society at large. It is to ensure transparency and gain trust of the stakeholders in the manner in which the company functions.[2] The whole idea of corporate governance is getting boosted due to various factors along with the changing business scenario. The demand for corporate governance is not something that is familiar to our country as well as the economy. This is the era of information and it has created awareness among the shareholders and public. Depending upon the model that is disclosed by corporate environment along with legal frameworks, right to information has forced corporate to evolve more than it ever did.[3]

The Indian environment of corporate governance, which is dealt in the book 'Directors and Corporate Governance' also, mentioned the weakness of the corporate environment in India. The corporate industry progressed slowly, as the economy was opening up and due to which the liberalisation process got started in India[4].

The main aim of this study is to understand the inter-link between competition regulations with corporate governance, and the interface between these two streams of law explaining how the task of maintaining the balance between both is essential for the organizations.

Gradual Evolution of Corporate Governance in India

The whole idea of corporate governance has gained boom because of various factors as well as the environment which is changing the business scenario. Due to the very nature of the concept, the idea of corporate governance cannot be specifically defined. However this is beyond any doubt that "accountability to all shareholders is the main objective of corporate governance"

The concept of corporate governance mainly focuses on accountancy, role of directors, lenders, maintaining transparency, accountability to the shareholders, maintaining good public image with a fresh and closer look. A framework of awareness includes public such as need for good environment, conservation of resources along with cost effective management

[1]Dr. S Chakravarthy, Competition and Corporate Governance, available at: http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=b12f5bae-bc82-4c6a-a5c8-55459a5a2559&txtsearch=Subject:%20Competition%20/%20Antitrust accessed on: 20/08/2018.

[2] Narayana N.R. Murthy, Corporate Governance and its Relevance to India, India International Centre Quarterly, Vol. 31, No. 1 (SUMMER 2004), pp. 104-111, available at: https://www.jstor.org/stable/23005916 accessed on: 20/08/2018.

[3]N.Gopalsamy, A Guide to Corporate Governance, New Age International Publishers, Edition I, 2006.

[4]Asish. K. Bhattacharya, Corporate Governance in India, change and continuity, Oxford University Press, 2016.

input. Government can also play an important role in maintaining quality governance with the help of regulatory framework. When corporate governance is practiced under a well put up system, it leads to legal, commercial as well as institutional framework under which these functions are to be performed.[5] In India the concept of corporate governance has come up mainly due to liberalization process as well as due to the need for new corporate compliance.[6]

Historical Development of Corporate Governance in India

India was said to have a functioning stock market at the time of independence in comparison to other countries along with goods manufacturing sector having industrial work along with well developed banking sector. The process of nationalization of most of the banks was done during the time of 1947 to 1991 and this lead in becoming principal advisor of debts and equity in private firms. The public companies had to maintain compliance with Companies Act, 2013 and this was the only requirement for them. Economic liberalization was the result of the financial crisis that happened in 1991 due to which the Indian Government had to go through series of reforms. As a result of which SEBI was formed in 1992 and by the end of 1990's the Indian economy had started to grow on a good pace and the expansion of Indian firms had started due to the process of liberalization and outsourcing. All these initiatives were only taken to improve the scenario of corporate governance in the market as at that time it was limited to basic principles.

Evolution of Competition Regulations in India

The concept of competition refers to the process of economic rivalry between different players in the market, in simple words it refers to the steps which a company/ business entity takes to create its monopoly in the market. However, while striving to create this monopoly, it is essential that fair practices are adopted. If we trace down the history of competition law in India it goes back to the year of 1960, this year the Mahalanobis Committee which was appointed by the government of India to look into the 'distribution of incomes and levels of living', submitted its report, which highlighted the growing inequalities in income, this inequality was considered to be a opposing the vision of "Justice- social, economic and political" as envisaged in constitution, this growing inequality was also in violation of DPSP principles read with the fundamental right to freedom of trade and commerce. So, on these lines of thought a high powered Monopolies Inquiry Commission was formed, this MIC submitted its report in 1965[7],

The recommendations of Monopolies Inquiry Commission became the backbone of the very first competition law of the country, the Monopolies and restrictive trade practice act was enacted which came into force in the year 1970. This act was basically enacted keeping in mind the socio-economic principle as provided under the Directive Principles of state policy in the constitution of India. The MRTP act since its inception has undergone numerous amendments starting from 1974, 1980,1982, 1984 till 1991 and finally in 2002 the Competition Act, 2002 was enacted based on the recommendations given by the Raghavan Committee, this new act repealed the MRTP act of 1969. The MRTP act mainly focused upon the monopolistic behavior and economic concentration, it had actually become obsolete as it did not match with the international economical developments, there was a need to move

[5] *Ibid.*
[6] Corporate Governance: The new paradigm Chartered Secretary October 1997.
[7] Amit KapurManas Kumar Chaudhuri Mansoor Ali Shoke, Competition Act, 2002 A Position Paper, J. Sagar Associates, New Delhi, Manupatra, 2009, available at : www.jsalaw.com/wp-content/uploads/2015/09/competition-act-2002.pdf.

the focus from checking monopoly to actually promote competition in the market[8], therefore the Competition Act 2002 was framed in India's quest of globalization, liberalization of economy, it was one of the key steps taken towards facing competition within country as well as from international players. According the act of 2002 established the Competition Commission of India to monitor the businesses, the act further has objectives to ensure the promotion of competition in business to guard the best interest of the consumer, to ensure freedom of trade and to prevent practices having adverse effects on markets. In order to achieve these objectives the act focuses on prohibition of the anti–competitive agreements[9], prohibition of abuse of dominant position[10] and regulation on mergers, acquisition and combination[11]. In 2012 another bill was proposed which extended the protection of rights to include any other intellectual property rights. It further brought in various amendments, out of which one of the major amendments which affected the companies and business entities was regulation of combination, i.e. the acquisition, amalgamation or merger. In the following chapters, the provisions of the competition regulations and the provisions related to corporate governance will be discussed in detail elaborating upon the issues Indian companies face to maintain the balance between the internal and external governance.

CHAPTER II

REGULATORY FRAMEWORK

- **For Corporate Governance in India**

Through the establishment of SEBI which was a result of economic liberalization which took place in 1991, the Central Government had to establish regulatory control over stock markets. SEBI was originally formed in 1988 but it was granted the authority for regulation in the securities market under Securities and Exchange Board of India Act, 1992.[12]

In India the public listed companies are generally regulated by multiple schemes. In the same way the Companies Act is governed by Ministry of Corporate Affairs. The Ministry of Corporate Affairs is the primary government body while the Securities Exchange Board of India has served as regulatory in securities market since 1992.

Securities Exchange Board of India is an independent entity for the regulation of securities market in India. Securities Exchange Board of India protects the interest of investors in securities and also does the promotion of securities in the stock exchange market.

It was found that Securities of Exchange Board of India did not have sufficient power to carry out the whole investigation of frauds during 1990s when there were bundle of frauds

[8] Competition Law in India, A Report on Jurisprudential Trends, Nishith Desai Associates 2015 available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf accessed on: 22/08/2018.
[9] Section 3, Competition Act, 2002.
[10] Section 4, Competition Act, 2002
[11] Section 5 & 6, Competition Act, 2002.
[12] The SEBI Act, 2002 provides for the protection of the interest of shareholders in order to maintain their safety.

committed in India.[13] Due to the commitment of such frauds the Securities and Exchange Board of India was amended and sufficient powers were given to it.

The Standing Committee in its final report recommended providing minimum benchmarks in order to allow regulators like Securities and Exchange Board of India to exercise their jurisdiction by a regulatory regime.

The mechanism of corporate governance in India is functioned by regulations/guidelines/listing agreement:

1. **The Companies Act 2013**
   The Companies Act, 2013 has provisions regarding composition of board, its meetings, general meetings, audit committee transactions regarding financial statement.
2. **SEBI Guidelines**
   SEBI has the authority of regulation over listed companies for the protection of the investors in the company.
3. **Standard Listing Agreement of Stock Exchange**
   It regulates only those companies who have their shares listed on stock exchanges.
4. **Accounting standards issued by the Institute of Chartered Accountants of India**
   It is a body to issue accounting standards regarding disclosure of financial statement.
5. **Secretarial standards issued by Institute of Company Secretaries of India**
   It is a body to issue secretarial standards regarding provisions of New Companies Act.

- **Under Competition Act**

The Competition Act covers various aspects related to the competition in the markets, however following are few important key aspects which somehow create the challenges for the companies to balance out with the requirements of the corporate governance:-

Anti – Competitive agreements

Section 3 of the act provides that no company or party should enter into any agreement which causes or it is likely to cause an appreciable adverse effect on the competition in the market within India is deemed to be anti-competitive and is hence prohibited, however it the term Appreciable adverse effect (AAE) is not defined in the act but section 19 (3) provides for certain deciding factors to categorize any agreement as creating AAE in the market. The factors provided under section 19 (3) include- "*creation of barriers to new entrants in the market, driving existing competitors out of the market, foreclosure of competition by hindering entry into the markets, accrual of benefits to consumers, improvements in production or distribution of goods or provision of services; promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services"*[14] . However prohibition in such agreements is not absolute and can be allowed in case of joint-venture agreements in certain cases. Such agreement can be both horizontal as well as vertical. When we talk about horizontal agreements, it basically refers to agreements between direct competitors, regarding *fix prices, limit production, supply, markets, bid-*

[13] The SEBI Act, 2002 amended the SEBI Act, 1992 which conferred the powers of search and seizure with the approval of the courts and enhancing it from hassle free regulation.

[14] Section 19 (3), Competition Act, 2002.

rigging, collusive bidding, geographically allocation of markets or source of production [15]. The horizontal agreements are generally presumed to have AAE on competition in the market. **Cartel** formation is the most damaging form of horizontal agreement as it includes association of producers, distributors, sellers, traders or service providers etc. In the *Cement Cartel case*, the CCI opined that the inference of the existence an agreement can be taken from the intention and the acts of the parties and the parallel behavior in price, this is indicative of the presence of coordinated behavior amongst the members in the markets.[16]

While the vertical agreements are entered into enterprises at different levels of production chain in different markets, for example agreement between manufacturer and producer. Such agreements include *Tie- in arrangements, exclusive supply or distribution agreements, refusal to deal and resale – price maintenance*[17] ; these agreements have the potential to hinder the entry of new players in the market. Other agreements except the above mentioned should be subjected to the rule of reason. If we look at the implications of section 3, it is clear that if any agreement is found to have AAE in the market, it will be declared null and void. But the main issue with such agreements is that any such agreement will only come into the knowledge of the public if any party to the agreement chooses to file complaint against it or if any third party files the complaint. Here the duty of competition commission of India comes into the picture, the commission has to examine the agreement that whether the restrictions imposed is reasonable or not as the contours of section 3 and 4 do not apply on reasonable restrictions.[18] If we analyze the section in simple words a mere understanding between two parties to something or not to do for business purposes is an agreement, such an agreement may not be in writing but it can be deciphered from the acts of the parties involved. In the case of *Multiplex Association case*, they collectively decided not release any film until the new revenue sharing terms were accepted, this act of merely writing letters clearly reflected an agreement among the movie producers to jointly fix prices and limit the production of the films.[19]

Abuse of Dominant Position

The Competition Act defines dominant position as "a *position of strength, which is enjoyed by an enterprise, in relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour"*[20]. This definition is based on the one provide in the European Union prohibition on abuse of dominance.[21] Section 4 of the act enumerates certain practices, any enterprise if found to indulge in any of those activities will be considered to abuse of dominant position, provided that that the enterprise enjoys a dominant position in the market. These activities include-

"(a) directly or indirectly, imposes unfair or discriminatory—
(i) condition in purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or service
(b) limits or restricts—

[15] Section 3(3), Competition Act, 2002.
[16] Builders Association of India vs Cement Manufacture, Case No. 29/2010, date of order, 20.06.2012.
[17] Section 3 (4), Competition Act, 2002.
[18] Supra note 8.
[19] Multiplex Association of India v. United Producers Distributors Forum and others, Case no.1 of 2009 decided on 25.05.2011.
[20] Section 4 (explanation), the Competition act, 2002.
[21] Article 102, Treaty on the Functioning of the European Union (TEFU).

(i) production of goods or provision of services or market therefore; or
(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
(c) indulges in practice or practices resulting in denial of market access 5 [in any manner]; or
(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market".[22]

The scope of section 4 is quite wide as it covers all the enterprises including public sector enterprises and government departments engaged in any trade or commerce activity even multinational companies which are working in large groups in India are subject to this section and CCI scrutiny in case of violation of this section. In order to bring in liability under this section, only the presence of any of the above listed activities is sufficient, unlike in section wherein the CCI had to determine the nature of restriction, under this section there is no such requirement, however the consequences of the inquiry which the CCI conduct for the purpose of this section are very serious as the CC, as CCI vast powers when it comes to violation of section 3 or 4. It may order to discontinue from acting on such agreement of abuse of dominance, impose monitory penalty which may extend to ten percent of the annual turnover, direct compliance or division of enterprise.[23]

Regulations on Combinations

Section 5 provides for combinations, broadly speaking combination includes merger, amalgamation and amalgamation. It is compulsory for all enterprises to notify the competition commission of India about their proposed combinations if the company's assets or turnover is above the revised threshold limits[24] as prescribed under section 5 and obtain clearance. This notification should be served to the CCI within 30 days[25] of the approval of the proposal by the board of directors (in case of merger) or the execution of the binding agreement (in case of an acquisition)[26]. The CCI after receiving such notification about the combination proposal can examine even those combinations which were executed prior to notification which may have caused any kind of adverse effect on the competition. In case the enterprise fails to notify the commission about any such combination, the commission may initiate the inquiry into it within one year of the combination coming into effect. Such failure may also attract fine up to one percent of the total turnover or assets, whichever is higher, of the combination[27]

It is essential to note here is that since all the combinations whether it is a merger, amalgamation or acquisition are executed by way of an agreement between the enterprises/ companies, such agreement would fall under the scope of section 3 either as horizontal agreement or as vertical agreement.

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[22] Section 4, the Competition act, 2002.
[23]Competition Law Bulletin, Vaish Law Advocates, Vol. I, No. 1, September-October, 2009 available at: http://www.manupatrafast.in/NewsletterArchives/listing/CNB%20Vaish/2009/September-October,%202009.pdf accessed on: 23/08/2018.
[24] Notification no. S.O. 675(E)dated March 4, 2017 available at : https://www.cci.gov.in/sites/default/files/quick_link_document/Revised%20thresholds.pdf accessed on: 24/08/2018
[25] Section 6(2), Competition act, 2002.
[26]Abir Roy, Jayant Kumar, Competition Law in India, second edition, 2014, pg.389.
[27] Section 43 A, the Competition Act, 2002.

On a concomitant reading of section 6 sub-clause 1 and 2 with section 43 A, it can be argued that the commission can only levy penalty for late or non- filing of notice only if it finds out that the combination is either causing or is likely to cause AAE in the market and otherwise not. When it comes to consummation of the transaction of combination before the approval given by CCI, the act does not provide for any penalty, however in the case of Eithad Airways and Jet Airways[28] the CCI levied fine for consummating the transaction before obtaining the approval from CCI[29], hence making it clear that no party can consummate the transaction of combination without prior approval.

CHAPTER III

INTERFACE OF CORPORATE GOVERNANCE IN INDIA WITH THE COMPETITION REGULATIONS

- During the time of Independence with four functioning capital markets, a defined micro structure and banking system with recovery norms was developed. India had inherited an established structure for corporate governance. The Companies Act, 1956 which is now amended in 2013 styled after British corporate laws, has been a major step of corporate governance in our country since its evolution, however the real problem arises when the company/ enterprise has to maintain a balance between the external and internal governance which is an evolving concept.
- Mostly the corporate governance norm focuses on the Board composition along with their committees, independent directors and management of CEO succession. The Boards are not given more empowerment in comparison of other countries and due to this reason the will of majority of shareholder is prevailing in the Indian companies. Here the issue faced by the company is to identify the internal and external stakeholders and accordingly entertain their respective interests in the company and the responsibility which then arise for the company, especially from the competition regulations prospect. But if there is problem in the internal governance and conflict between the internal stakeholders, this might affect the company's strategy for external governance.
- Another duty is on the managers to make the variables of completion in the same direction as that of the corporate governance, for instance if there is stiff competition this can reduce the profit margins of the company, ultimately affecting the market value of the shares and the interest of the various shareholders and consumers. This may trigger the corporate takeover, hence the managers have to stay alert and abide by the provisions of the Competition Act as well as corporate governance.
- Mostly the problem arises due to the misunderstanding and problem between majority and minority of shareholders. This problem is applicable throughout all Indian companies including the private sector companies and also the business groups.

[28] Combination Registration No. C-2013/05/122 available at: https://www.cci.gov.in/sites/default/files/C-2013-05-122%20Order%20121113.pdf accessed on: 24/08/2018.
[29] Supra note 23.

- This dominant environment of the bureaucrats in the corporate governance is closely related with that of abuse of dominant position under section 4 of the Competition Act, 2002. Abuse of dominant position occurs when a dominant firm in market or a group of firms engages in a conduct that is intended to eliminate new competitions.[30] This might affect the reputation of the company in long run, the CCI has time and again reiterated that such an act will attract penalty.
- This dominant environment in the corporate governance is also closely related with that of abuse of dominant position under section 4 of the Competition Act, 2002. Abuse of dominant position occurs when a dominant firm in market or a group of firms engages in a conduct that is intended to eliminate new competitions. The company in order to increase the profit margin and impress the stakeholders cannot indulge into such anti- competitive acts which are prohibited in the competition act.
- One of the key challenges which a company faces is to identify the stakeholders, both external and internal and then to identify their interests.

Liability of Directors under the Indian Competition Regime

The directors of the company have responsibility towards the shareholders for the interest of the company, employees and public at large. It is the fiduciary duty of directors to maximize the revenues of the company as it will be in the benefit of the whole company.

The Competition Act, 2002 regulates to penalize the officers in the company who don't follow their responsibility properly.

Relevant provisions under the Act

Section 48(1) of the Act provides that any person who is committing contravention of any provisions in the Act shall be guilty and also be liable for punishment against it.

In *Prasar Bharti* case[31] it was held that violation of section 48(1) is committed and the Directors of the company were held liable for the same as it was their responsibility to protect the interest of the shareholders of the company.

Similarly the Competition Commission of India held in *Bengal Chemist case*[32] held the Bengal Chemists and Druggists Association guilty for anti- competitive agreement and penalized them.

Similarly the Competition Commission of India held the directors of Jute Mills Associations vicariously liable for anti competitive agreements in *Indian Jute Mill Association case*[33].

Similarly Section 27 of the Act also has empowerment against the regulator in India. It can impose penalties for anti competitive agreements upon persons and enterprises who are parties to such agreements.

[30] https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf.
[31] Prasar Bharti (Broadcasting Corp of India) vs TAM Media Research Pvt Ltd Case no. 70 of AIR 2012.
[32] Bengal Chemist and Druggist Association, Suo Moto Case No. 2 of 2012.
[33] Indian Sugar Mill Association vs Indian Jute Mill Association, Case No. 28 of 2011.

CONCLUSION

Corporate Governance can be said to be a competition booster. Corporate Governance is especially needed in a company when competition is lower in the market for the management of corporate control and the market is surviving for top managers. Similarly in case of competition, with the help of Corporate Governance it increases the efficiency of the employees. Corporate Governance along with Competition Act increases the efficiency of monitoring the policies in order to improve the standards and implement good practices removing the anti competitive elements from the market. However, this interface between the corporate governance and competition regulations creates a set of responsibilities on the management and directors of the company to abide by the regulations and provisions of the Competition Act, as any kind of violation might attract a liability on the company as well as the director. The Competition Act has explicitly dealt with practices generally taken up by the companies, such as entering into anti-competitive agreements, forming cartels, abuse of dominant position in the market or forming any such merger or acquisition etc. which would have an adverse affect on the market or may hinder entry of new players. The whole discussion of interface comes into place as it is very essential to maintain a balance between the variables of competition as well as Corporate Governance keeping in mind that both have inherit interest of stakeholders in them.

Title: Issues and Challenges Pertaining to Executive Compensation in India

~YASH PANDEY[*]

If you pick the right people and give them the opportunity to spread their wings – and put compensation as a carrier behind it – you almost don't have to manage them.

-Jack Welch[1]

Abstract

Executives are paid high remuneration to attract and motivate them to work towards achieving high profits for a company. According to an article published in the Economic Times top Indian Executives Earns around 243 times more than an average employee. Executive compensation is an important issue of Corporate Governance. Here the company has to balance the interest of the stakeholders and at the same time they are required to provide an appropriate incentivize to propel executives to achieve higher targets. The recent row over high remuneration package offered to Vikas Sikka, the CEO of Infosys, reopened the debate regarding High Executive Compensation and Corporate Governance issue in India. It has shed light on the vital aspect as to how even in presence of regulatory framework regarding executive compensation there is huge dissent among shareholders in respect of high remuneration packages to executives. This paper will mainly focus on the various Corporate Governance issues in relation to Executive Remuneration. Many instances regarding experience of foreign countries as well as domestic companies have been discussed in this paper. The paper also discusses the recommendation made by Uday Kotak Committee in regard to Executive Remuneration. The conclusion from this study is that, although, several attempts were made in Indian Legal System to improve Corporate Governance in regard to executive remuneration still much needs to fixed and done in this regard. There is a need to explore Corporate Governance practices like 'Say on Pay', appointing Remuneration Consultants, Release of Claims Clause, etc.

Introduction

In a corporate set up shares of a company are held by shareholders but the company is run by the professional managers. The interest of shareholders and the interest of managers may vary. Managers may get disproportionate amount of money for certain corporate actions and they may often get disproportionate benefit from others[2]. Since, the managers are at the fulcrum of decision making of a company they may take such decisions which increase their profits and benefits. Such decisions might not be in the interest of the company. This is known as the agency cost of separation of ownership from management[3]. Therefore, it is

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[1]Former Chairman and CEO of General Electric. See: Kaushik Dutta, Handbook for Independent Directors 169 (2nd Edition, Lexis Nexis, 2016).

[2]Jayati Sarkar and Subrata Sarkar, Corporate Governance in India 313 (SAGE Publications India, 2012).

[3]id.

important to align the interest of the managers with the interest of the company. The managers should work in the interest of the company.

In the recent times the trend of paying high remuneration to executives in various companies has become a contentious issue. The 2009 debacle of U.K. banks drew attention to the issue of Executive Compensation, wherein excessive compensation led to reckless and excessive risk taking[4]. The companies undertook risk more than their appetite and it resulted in their inability to return debts. In light of this event serious reforms were brought in U.K. with regard to corporate governance. Sir David Walker headed Review of Corporate Governance in U.K. Banks and Other Financial Industry Entities, the 12th recommendation of this review committee was related to executive compensation, related disclosure, role of remuneration consultant, etc. Later, when the U.K. Corporate Governance Code 2010 was introduced, it incorporated some of the walker report recommendations. It provided that the pay-performance remuneration should be aligned with long term interest and risk policy systems of the company[5]. An independent body by the name of High Pay Commission was launched in 2009 to look into the high executives and boardroom pay in various companies in U.K.. The final report by High Pay Commission reported that the pay of some executive soared by more than 3000 times in the last thirty years[6]. U.K. has also set a High Pay Center that looks into the cases where high remuneration is paid to the top executives.

The gap between average wage of an employee and an executive of a company is also an aspect that draws concern regarding executive compensation. The International Labour Organisation (ILO) 2008 report states that in 2007 in U.S. the average income of 15 'largest companies' executives officers (CEOs) was 520 times more than an average worker[7]. The issue of Persimmon CEO Jeff Fairburn's excessive pay reveals the difference between the salary of an average employee and CEO of a company. The payment of Jeff Fairburn was whooping 3000 times more than the lowest paid employee and 1000 times more than the average employee of Persimmon[8].

The repeated executive pay scandals indicate that there is a need to improve the existing corporate governance principles in regard to executive remuneration. There is a need to make meticulous scrutiny of remuneration criteria. An excessive remuneration would result in a generous award to the executives which will in turn make the executives complacent. Low or inadequate remuneration to the executives will not provide proper incentive to the executives to work harder. In cases where the company is not performing extremely well despite the best efforts of executives, the executives should not be penalised as it would discourage them to undertake risks[9]. Therefore it becomes difficult to determine as to what should be the adequate remuneration that should be given to the Executives of the company.

The study is divided into four parts. The first part deals with the concept of executive remuneration, role of remuneration committee, role of remuneration consultants and recent

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[4]Christine A. Mallin, Corporate Governance 189 (Oxford University Press, 2016).
[5]Id.
[6]High Pay Commission: most people believe executive pay 'out of control, The Telegraph (22, November, 2011) https://www.telegraph.co.uk/finance/financialcrisis/8906033/High-Pay-Commission-most-people-believe-executive-pay-out-of-control.html. accessed on 05, August, 2018.
[7]Mallin, supra, 188.
[8] James Moore, Persimmon: Will £100m CEO Jeff Fairburn accept blame if the roof falls in as some analysts fear, Independent (05, July, 2018).
www.independent.co.uk/news/business/comment/persimmon-builder-jeff-fairburn-100m-pay-package-housing-market-rachel-reeves-parliamentary-business-a8432426.html. accessed on 05, August, 2018.
[9] Sarkar and Sarkar, supra, 314.

trends in regard to executive compensation. The second part of the study deals with instances where issues regarding executive remuneration came into light in foreign companies. The third part deals with the issue of executive compensation in the Indian context. The fourth part of the study includes conclusion and suggestions.

Chapterization

Table of Contents

I[st] Part: Executive Compensation

Meaning of Executive Compensation

According to Grossman and Hart, "executive compensation is a way of designing contracts which will incentivize managers to choose the actions that maximize firm's value and makes him to exert the required effort to achieve the expected outcome"[10].

An apposite executive compensation contract should focus on incentivizing managers to work for short term and long term revenue goals of a company. Compensation contract that overemphasise on fixed payment will not incentivize mangers to maximize long term revenue goals of the company whereas compensation agreements that only focuses on long term revenue might not properly incentive risk-averse managers to undertake risk[11]. The key element in designing these contracts is not only what to pay but also how to pay[12].

Components of Executive Compensation

The fundamental point of focus while designing an executive compensation agreement is determining the fixed payment and incentive based payment to the executives. Incentive based payment can be made in the form of bonus or equity[13]. The executive compensation can include the basic salary, bonuses, stock option, restricted share plans, pension and benefits (car, health care, etc)[14]. The bonuses are paid according to a pay performance relation in most companies. In many cases there is a threshold above which bonuses are paid. When a company's performance reaches this threshold bonuses are paid. Beyond this threshold the bonuses vary with the performance and finally there is a ceiling beyond which no extra bonus is paid even if the performance increases. This non-linearity in pay-performance often induces executives not to give their best effort when the performance of company is so low that it cannot meet the threshold or where the performance is too high to hit the cap. In such circumstances, these executives are likely to conserve their effort for the next year. This also leads to a situation where managers nears to the performance threshold of bonus may sacrifice long term profitability of the company in lieu of short-run profitability and it might induce some to manipulate accounting numbers for minimum bonus[15].

The supporters of high remuneration to executives say that it acts as a propelling force for executives to work harder. Remuneration based on pay performance results in growth of a company as well as it keeps the executive class motivated to excel. On the other hand, people who criticize lofty remuneration packages to executives have three basic problems. Firstly, there is no definite criterion to determine as to what should be the ideal remuneration package for such executives and in many cases faulty or improper remuneration schemes are made that provides inordinate sums to the executives of a company.[16] Secondly, the determination of the remuneration of executives is not realistic at times[17]. The projected growth or targets

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[10] Sarkar and Sarkar, supra, 314.
[11] id.
[12] Mallin, supra, 192.
[13] Sarkar and Sarkar, supra, 315.
[14] Mallin, supra, 195.
[15] Sarkar and Sarkar, supra, 315.
[16] Isabelle Fraser, Persimmon chairman resigns after row over giant exec bonuses, The Telegraph (15, Dec, 2017) www.telegraph.co.uk/business/2017/12/15/persimmon-chairman-resigns-pay-row/. accessed on 05, August, 2018; Here Faulty remuneration scheme was made by remuneration committee.
[17] See: Infosys Executive Compensation Row under Part III.

are overstated[18]. Nomination and remuneration committee determines the remuneration on the basis of projected growth and achievable targets of a company. The projected growth or targets of a company are often bloated by the remuneration committee, to receive favours from the executives, on the basis of which high remuneration is provided to the executives. Thirdly, there are cases where the performance of a company is sluggish or the growth is slow[19] in comparison to previous years but still a high remuneration package is offered to such executives. The executive compensation package which is weakly correlated with firm's industry performance[20] makes the executive lethargic and it negatively affects the company's growth because there is no incentive for executives to perform better if they are paid high without performing well. It is often argued that instead of providing generous remuneration to CEO's the hard work others should be valued and recognized.

Remuneration Committee

Under Companies Act 1956 there was no provision in regard to constitution of remuneration committee. However, under section 178 of the 2013 Companies Act it was made mandatory for some companies to have a nomination and remuneration committee. It was first suggested by Kumar Mangalam Birla Committee Report, under desirable recommendations, that remuneration committee should be set up to determine the remuneration policy for executive directors[21]. Remuneration committee, being comprised of independent directors[22], provides transparency in regard to the remuneration scheme made for executives. The idea behind forming such committees is that they can work at arm's length and they can provide non-partisan deliberations[23].According to Ms. Sangeeta Talwar, Indepent Director with Relegate Enterprise Limited, "Remuneration committee could be effective with a clear articulation and documentation of performance outcomes for company, its individual businesses and its key personnel and directors at the start of the business cycle."[24] She further points out, "The company's remuneration policy review which highlights comparison with industry benchmarks and key competitors promote great effectiveness.[25] Even before introduction of provision in regard to remuneration committee many companies already had their own remuneration committee[26]. The presence of remuneration committee ensures that the remuneration policy remains transparent, as per prevalent market standards and at an arm's length from the executives.

Role of Remuneration Consultant

Compensation consultants are generally hired by big companies to advice on executive remuneration policy. The idea behind hiring remuneration consultants is that they have vast experience and knowledge of designing remuneration scheme for executives therefore they can reduce separation of agency cost and align the interest of executives with that of the company[27]. They also help the company to attract and retain senior executives of appropriate

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[18] See: Enron Scandal discussed under Part II.
[19] M Allirajan, Shareholder activism stalls promoter moves, The Times of India (05, Jul, 2014). https://timesofindia.indiatimes.com/business/india-business/Shareholder-activism-stalls-promoter-moves/articleshow/37797011.cms. accessed on 05, August, 2018.
[20] Report on Trend and Progress of Banking in India 2008-09, Reserve Bank of India (30, June, 2009) https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RTP0809PRD_Full.pdf. accessed on 05, August, 2018.
[21]SnajayBhayana, Corporate Governance Practices in India 15 (Regal Publications, 2007).
[22]Companies Act, § 178(2) (2013).
[23] Kaushik Dutta, Handbook for Independent Directors 169 (2nd Edition, Lexis Nexis, 2016).
[24]id. at p 174.
[25]id.
[26] Sarkar and Sarkar, supra, 347.
[27] Kevin J. Murphy and Tatiana Sandino, Compensation Consultants and the Level, Composition and Complexity of CEO Pay, Harvard Business School, (28, August, 2017).

quality, experience and skills that is necessary for the success of business of a company[28]. On the other hand it is also argued that the presence of remuneration consultant has resulted in increase of executive remuneration[29]. In order to get retained and sell other services to companies the remuneration consultants have exacerbated rather than reducing the agency problem[30]. They use more complex incentive plans that are associated with higher pay to the executives[31].

In regard to India there is no specific provision in regard to remuneration consultant. However, as practice remuneration consultants are hired by various companies to formulate remuneration policies.

Approval by Shareholders for Executive Remuneration Package

The corporate set up works in a manner that the ownership and management of a company is separate, because of this separation the age old problem of agency cost separation arises. Shareholders have often complained about the mismanagement and misappropriation by the executives of a company. Concept of 'say on pay' developed as a means to provide opportunity to shareholders to raise their concern in regard to the executive remuneration paid to the executives of a company[32]. The 'say on pay' was introduced in U.K. by the Directors Remuneration Report Regulation in 2002[33]. Initially the 'say on pay' vote by shareholders was not made mandatory in U.K.[34] but in 2013 it was made mandatory in regard to some companies[35].

In India the proviso to section 197(1) provides for approval of shareholders to executive remuneration. Prior to 2013 companies act the approval of Central Government was required in regard to executive compensation but now it is made mandatory to also seek the approval of shareholders in case managerial remuneration of a company exceeds the ceiling of 11% of net profit of the company[36].

Corporate Governance in Relation to Executive Compensation in India

The Corporate Governance in India in regard to Executive Compensation has witnessed a paradigm shift after Liberalisation[37]. Several committees were formed to improve Corporate Governance in India, like the Kumar Mangalam Birla Committee, Narayana Murthy Committee, Naresh Chanadra Committee, etc. The suggestions by Kumar Mangalam Birla

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https://www.hbs.edu/faculty/Publication%20Files/18-027_0c1615e5-fbd2-4872-a44f-ad5f36d1f9a9.pdf. accessed on 05, August, 2018.

[28]Rezaul Kabir and MarizahMinhat, Compensation consultants and CEO pay, University of Twente (April 2014) https://ris.utwente.nl/ws/files/6745858/Compensation%20consultants%20and%20CEO%20pay%20SSRN-id2436793.pdf. accessed on 05, August, 2018.

[29]id.

[30] Murphy and Sandino, supra.

[31]id.

[32]Randall S. Thomas and Christoph Van der Elst, Say on Pay Around the World, 92(3) Washington University Law Review, 655 (2015). https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6133&context=law_lawreview accessed on 05, August, 2018.

[33]Mallin, supra, 206.

[34] Murphy and Sandino, supra, 665.

[35] Murphy and Sandino, supra, 668.

[36] A Ramaiya, Board of Directors 258 (Lexis Nexis, 2017).

[37]Rajesh Chakrabarti, Krishnamurthy Subramanian, Pradeep K Yadav and Yesha Yadav, Executive Compensation in India, SSRN (28 Sep 2011). https://ssrn.com/abstract=1934923. accessed on 05, August, 2018.

Committee and Narayana Murthy Committee resulted in framing of SEBI's Clause 49[38]. Clause 49 provides for disclosure framework to improve corporate governance in regard to executive compensation[39].

Section 197 of Companies Act, 2013, talks about Executive Compensation. Section 197 provides that the total managerial remuneration should not exceed the ceiling of 11% of company's net profit for the financial year. In case managerial remuneration exceeds the ceiling, the company in general meeting, with prior approval of government, can authorise such remuneration. This authorisation shall be subject to the provision of Schedule V of Companies Act[40].

There are some other disclosure safeguards provided in the form of Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014 and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015[41], like disclosure regarding the percentage increase in remuneration of director, CEO, CFO, etc..

IInd Part: Instances of Dissent in Foreign Companies

Enron pay Scandal

In 1985 Enron Corporation was established, it was involved in energy sector business. Enron Corporation's exceptional growth drew attention of all including the Wall Street professionals[42]. The annual revenue of Enron Corporation grew from under $10 billion (1990s) to a whooping $139 billion in 2001. Enron was recognised as the fifth biggest company on the Fortune 500[43]. The success of Enron was short-lived as the company soon ran into bankruptcy in 2001[44]. It was later revealed by the company that the revenues were overstated dating back to 1997[45].

Remuneration amounting to $681 million was paid to the top managers[46]. Officials now say that this huge remuneration was paid at the time when the corporate officials were trying to show inflated profits of the company[47]. Bonus payments amounting to $320 million were made just 10 months before the collapse of Enron's into bankruptcy[48]. This hinted at a strong financial motive to project inflated profits for the company. Distorted profit records were

[38] id.
[39] id.
[40] Ramaiya, supra, 250.
[41] Soumya Kanti De Mallik and DebarupaAgarwala, Executive compensation in India: Summing up the Infosys controversy, HSA Advocates (2017). https://www.hsalegal.com/2017/06/09/executive-compensation-in-india-summing-up-the-infosys-controversy/. accessed on 05, August, 2018.
[42] Mark Jickling, The Enron Collapse: An Overview of Financial Issues, CRS Report for Congress (30, Jan, 2003) https://royce.house.gov/uploadedfiles/rs21135.pdf. accessed on 05, August, 2018.
[43] id.
[44] Enron Fast Facts, CNN (23 April 2018) https://edition.cnn.com/2013/07/02/us/enron-fast-facts/index.html. accessed on 05, August, 2018.
[45] id.
[46] David Teather, Enron paid out $681m to top executives, The Guardian (18 Jun 2002). https://www.theguardian.com/business/2002/jun/18/corporatefraud.enron. accessed on 05, August, 2018.
[47] Kurt Eichenwald, ENRON'S MANY STRANDS: EXECUTIVE COMPENSATION; Enron Paid Huge Bonuses in '01; Experts See a Motive for Cheating, The New York Times (2002).
[48] id.

shown as the executives knew that the bonuses were around the corner and most of the executives left the company after drawing huge remuneration.[49].

This was one of the biggest accounting frauds in U.S. This scandal prompted the U.S. government to improve corporate governance framework and to bring in disclosure norms in regard to executive remuneration[50].

Worldcom scandal

Worldcom was a telecommunication giant. It reported misstatement in earning in 2002. Worldcom overstated its earnings to the tune of $9 billion[51]. On 21 July 2002 Worldcom filed for bankruptcy. On one hand huge remuneration was paid to 558 top executives to make sure that they do not leave the company. On the other hand, 17000 workers were removed from their job while the terms of their severance package was not properly decided[52]. Similar situation was there in case of Enron where immediately before company running into bankruptcy huge remuneration was provided to the top managers[53]. The scandal does not stop here, to add cherry to the top, the CEO of Worldcom Bernard Ebbers resigned on 30 April 2002 and soon after his resignation he started selling his shares in Worldcom[54]. This further hit the stock price of Worldcom shares. To prevent him from doing so Worldcom gave him loan, it is not clear why loan was given to him but he misappropriated the ransom earned[55].

This scandal along with Enron scandal prompted the U.S. government to bring in Sarbanes-Oxley Act of 2002[56]. It was aimed at improving corporate governance by providing incentive for corporate disclosures[57].

Libor Scandal

In 2012, Libor (London Interbank Offered Rate) scandal came to light. The investigation revealed multiple banks manipulating the interest rates for showing inflated profits since 2003[58]. Banks like Deutsche Bank, UBS, Royal Bank of Scotland, Barclays were involved in such manipulations[59].

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[49] id.

[50] Antony W Dnes, Enron, Corporate Governance and Deterrence, 26(7) Managerial and Decision Economics, 421-429 (2005).
https://www.jstor.org/stable/pdf/25151400.pdf?refreqid=excelsior%3A1b72dcfee614c9fe8ae6477e5901e1e9. accessed on 05, August, 2018.

[51] Andrew T Schutz, TOO LITTLE TOO LATE: AN ANALYSIS OF THE GENERAL SERVICE ADMINISTRATION'S PROPOSED DEBARMENT OF WORLDCOM 56(4) Administrative Law Review, 1263-1284 (2004)
https://www.jstor.org/stable/40712197. accessed on 05, August, 2018.

[52] Barnaby J Feder, TURMOIL AT WORLDCOM: THE EXECUTIVES; Bonuses Once Meant to Retain Talent Now Risk Outrage, The New York Times (2002)
https://www.nytimes.com/2002/06/29/business/turmoil-worldcom-executives-bonuses-once-meant-retain-talent-now-risk-outrage.html. accessed on 05, August, 2018.

[53] id.

[54] Lucian Cernusca, Ethics in Accounting: The Worldcom Inc. Scandal, 14 Lex ET Scientia International Journal, 239-248 (2007)
https://heinonline.org/HOL/P?h=hein.journals/lexetsc14&i=245> accessed on 05, August, 2018.

[55] id.

[56] Haidan Li, Morton Pincus and Sonja OlhoftRego, Market Reaction to Events Surrounding the Sarbanes-Oxley Act of 2002 and Earnings Management, 51(1) The Journal of Law & Economics, 111-134 (Feb, 2008)
https://www.jstor.org/stable/10.1086/588597. accessed on 05, August, 2018.

[57] Dnes, supra, 50.

[58] James McBride, Understanding the Libor Scandal, Council on Foreign Relations (12, Oct, 2016)
https://www.cfr.org/backgrounder/understanding-libor-scandal. accessed on 05, August, 2018.

[59] id.

In Libor rigging scandal Barclays former chief operating officer Jerry del Missier was found to be a leading figure. Despite this Jerry del Missier was given a payoff of almost £9m[60]. The shareholders were also outraged at the £17 pay package approved by remuneration committee head Alison Carnwath for Bob Diamond, the then CEO of Barclays[61]. In this event over generous severance package was given to Chief Operating Officer despite his role in Libor Scandal.

Opposition to Citigroup CEO pay package

Citigroup bank the third biggest bank of U.S. was given a bailout package in 2008 by U.S. government. In Feburary 2009 the CEO of Citigroup Bank, Vikram Pandit, said that he would only take $1 dollar as a salary till the bank becomes robust[62]. VIkram Pandit drew a salary of $1 and no bonus in 2010. Vikram Pandit was given a pay package of $14.9 million for 2011. However, in 2012 the shareholders vehemently opposed the 15 million pay package proposed for Vikram Pandit, with only 45% shareholders approving the pay package.

The vote given by the shareholders was not binding but the controversies that followed resulted in VIkram Pandit leaving Citigroup Bank[63]. In this present instance though the vote give by shareholders was not binding but it expressed serious concerns of the shareholders.

Issue of Compensation package to Carlos Ghosn, CEO of Renault

A major change in regard to executive compensation was witnessed by French Corporate Governance System after the Renault episode. In 2013, France introduced ex-post say on pay vote under AFEP-MEDF code[64]. Initially it appeared the system worked well. The approval rate in most of the companies in regard to executive remuneration was around 90%[65]. The scenario changed when in 2016 Carlos Ghosn, the CEO of Renault remuneration package was approved by only 45% shareholders but it was still confirmed by the board of directors within few hours[66]. The State of France was a major shareholder in this company. State as a shareholder also opposed the pay package.

This event prompted the France government to introduce one of the most stringent say on pay vote in the world under Sapin II Law[67]. It provides for an ex-ante vote, i.e. forward looking vote on the remuneration policy for executives. It also provides for an ex post vote, i.e. a backward looking vote in respect of remuneration due to the executives in the prior year. If this ex post vote is negative the variables and exceptional remuneration would not be payable to the concerned executive[68].

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[60] Alistair Osborne, Libor scandal: Barclays executive Jerry del Missier given £8.75m pay-off, The Telegraph (25, Jul, 2012) https://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9427881/Libor-scandal-Barclays-executive-Jerry-del-Missier-given-8.75m-pay-off.html. accessed on 05, August, 2018.

[61] id.

[62] id.

[63] id.

[64] Alain Pietrancosta, Say on pay: The new French le-gal regime in light of the Shareholders' Rights Directive II, University of Oxford (30 Nov 2017) https://www.law.ox.ac.uk/business-law-blog/blog/2017/11/say-pay-new-french-legal-regime-light-shareholders-rights-directive. accessed on 05, August, 2018.

[65] id.

[66] id.

[67] id.

[68] id.

Persimmon Chairman Executive Compensation Row

The Chairman, Nicholas Wrigley, and the remuneration committee head, Jonathan Davie, of Perismmon resigned while recognising that it was their fault that they did not put a cap on Remuneration scheme for executive when the scheme was prepared in 2012[69]. As a result of this act the CEO of Perismmon,Jeff Fairburn, received pay of around £109[70]. There was huge hue and cry in this regard[71].

The underlying issue here was how the Long Term Incentive Plan of the company was designed (LTIP). According to this plan the top executives were to be rewarded with shares up to 10% of company's total value[72]. Shareholders made total return of more than 600% with reinvested dividends since 2012[73]. The payout of CEO was also criticized as the Perismmon's profits were greatly boosted by Government Help to buy Programmes. The scheme financed 50% of the house built and sold by Perismmon. Many investment group and research consultants criticized this payout as it was not linked to targets[74]. Targets like how many houses were built by Perismmon.

BP CEO Remuneration Reduction

BP is a British Oil and Gas company. In 2010, a deep water explosion and oil spill happened in Gulf of Mexico because of the BP group[75]. This event plummeted the profits and production of the company. Despite recording annual loses in year 2015 the salary of CEO, Bob Dudley, was increased by 20% in the year 2015[76]. This increase in remuneration drew huge opposition from the shareholders. Almost 60% of the votes by shareholders were against this remuneration scheme[77]. This dissent of shareholders prompted the BP Group to reconsider the remuneration given to Bob Dudley. In 2016, a major decision of reducing the pay package of Bob Dudley by 40% was taken by the BP Group[78].

BT Group CEO Payout of £2.3m Criticized by Shareholders

The CEO of BT Group, Gavin Patterson, took command of the company from 2013. Under his leadership the company performed very well. Under his reign the company's stock prices hit the peak price of 500 pence in November 2015[79]. In 2017, however, his tenure was marred by auditing irregularities in the Italian Unit of BT Group[80]. Since then the company's stock price has slid steadily and it is now trading at around 200 pence[81].

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[69] Isabelle Fraser, Persimmon chairman resigns after row over giant exec bonuses, The Telegraph (15, Dec, 2017) www.telegraph.co.uk/business/2017/12/15/persimmon-chairman-resigns-pay-row/. accessed on 05, August, 2018.
[70] Id.
[71] James Moore, Persimmon: Will £100m CEO Jeff Fairburn accept blame if the roof falls in as some analysts fear?, Independent (5 July 2018) www.independent.co.uk/news/business/comment/persimmon-builder-jeff-fairburn-100m-pay-package-housing-market-rachel-reeves-parliamentary-business-a8432426.html. accessed on 05, August, 2018.
[72] Fraser, supra.
[73] id.
[74] id.
[75] Nathalie Thomas, Cat Rutter Pooley and Andrew Ward, 'BP cuts chief's pay by 40% to $11.6m to avoid shareholder revolt, Financial Times (06, April, 2017) https://www.ft.com/content/2eef10ba-1ab4-11e7-bcac-6d03d067f81f. accessed on 05, August, 2018.
[76] id.
[77] id.
[78] id.
[79] BT boss Gavin Patterson to step down, BBC News (08, June, 2018) https://www.bbc.com/news/business-44410114. accessed on 05, August, 2018.
[80] id.
[81] id.

In the wake of these developments the remuneration report for the year ending in 31 March 2018 received lower levels of support from the shareholders[82]. The concerns of shareholders were particularly related to annual bonus payment to Gavin Patterson[83]. As a result of these events the company in June decided to replace Gavin Patterson[84]. The concerns of the shareholders displayed through a vote on remuneration report resulted in replacement of CEO of BT Group.

III rd Part: Instances of Dissent over Executive Remuneration in India

Satyam Scandal

Satyam fiasco was one of the biggest scandals in India. It is also known as the 'India's Enron'[85]. In this case the accounts were inflated and manipulated by the Satyam group to show a robust company with huge growth[86]. It was later stated by the then Chairman of Satyam, Ramalinga Raju, that 94% of the cash on the company's books was fictitious[87]. The stock price of Satyam shares crashed overnight after Raju Ramalingam confessed to the wrongdoings[88]. In his confessional letter Raju has stated that he has not taken any money while creating a rosy picture of Satyam[89] but the SEBI investigation concluded that Raju along with others sold Satyam shares for profit and used these shares as collateral for taking loan while being fully aware that the accounts were fudged[90]. SEBI ordered Ramlingam Raju along with four of Satyam's former executives to pay about $308 million in gains from aacounting scandal[91].

The Executive remuneration aspect in relation to Satyam is not hugely debated however, Ramilngam Raju and others received bonus shares and Employee Stock option scheme shares on the inflated shares[92]. Therefore, although the salary that Raju Ramlingam drew from Satyam was not huge but by inflating shares of company and selling these shares he made huge profits. This scam caused Indian government to take steps to improve Corporate Governance in India. Voulntary Guidelines were issued by Ministry of Corporate Affairs to

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[82] Julia Kollewe, BT Hit by Shareholder Revolt Over Outgoing Chief's £2.3m Pay, The Guardian (11, Jul, 2018) www.theguardian.com/business/2018/jul/11/bt-hit-by-shareholder-revolt-over-outgoing-chief-pay. accessed on 05, August, 2018.
[83] id.
[84] id.
[85] Saritha Rai, Despite Dramatic Half-Billion-Dollar Award In Satyam Scandal, 'India's Enron,' It May Be Years Before Investors See A Dime, Forbes (21, Jul, 2014) https://www.forbes.com/sites/sarithara i/2014/07/21/despite-dramatic-half-billion-dollar-award-in-satyam-scandal-indias-enron-it-may-be-years-before-investors-see-a-dime/#7306b3de4e34. accessed on 05, August, 2018.
[86] Aarati Krishnan, Finally, The Truth About Satyam, The Hindu Business Line (18, July, 2014) https://www.thehindubusinessline.com/opinion/columns/aarati-krishnan/finally-the-truth-about-satyam/article22985569.ece. accessed on 05, August, 2018.
[87] How did Satyam pull off India's biggest corporate fraud?, Livemint (08, Jan, 2009) https://www.livemint.com/Companies/on7QniyL4R7oueX4x2Du1I/How-did-Satyam-pull-off-India8217s-biggest-corporate-frau.html. accessed on 05, August, 2018.
[88] Varun Sinha, Satyam Fraud: Why Ramalinga Raju Was Forced to Confess in 2009, NDTV Profit (09 April 2015) https://www.ndtv.com/business/satyam-fraud-why-ramalinga-raju-was-forced-to-confess-in-2009-753607. accessed on 05, August, 2018.
[89] Krishnan, supra.
[90] Rai, supra.
[91] id.
[92] Satyam case: ED seeks prosecution of Raju, others, The Hindu Business Line (28, Oct, 2013) https://www.thehindubusinessline.com/info-tech/satyam-case-ed-seeks-prosecution-of-raju others/article20682657.ece1. accessed on 05, August, 2018.

improve Corporate Governance[93] and an attempt was made to fix the loopholes through the 2013 Companies Act[94].

Tata Motor's shareholders reject executive pay scheme

In 2014 the remuneration policy formulated for the managing directors of Tata Motors was rejected by the shareholders[95]. A senior analyst said that it was fair that the remuneration policy was not approved by the shareholders looking at the performance of the company but at the same time he cautioned that it might demoralize employees and prompt many to leave company[96].

Stakeholder Empowerment Service (SES), a proxy advisory firm, recommended the shareholders to seek remuneration of executives in the form of claw back bonuses and commissions which are aligned with the performance of company. It would act as a good corporate governance practice[97].

Infosys Executive Compensation Row

The controversy ensued after many founder of Infosys including Narayan Murthy raised concern over the compensation given to the former CEO of Infosys, Vikas Sikka, and huge severance package given to the then CFO, Rajiv Bansal[98]. The compensation given remuneration package for Vikas Sikka was increased by 55% Executives at Infosys, from $7.08 million to $11 million[99]. The remuneration policy was not clear the targets were not properly disclosed[100]. There were other reasons as well to criticize the pay package to Vikas Sikka as the salary he drew was 935 times more than the median salary at Infosys[101]. The other reason why the remuneration contract was criticized was because it included a clause ensuring minimum pay of $10 million, irrespective of the performance of Infosys[102]. There was no provision regarding Release of Claims clause in Vikas Sikka remuneration contract. Release of Claims clause has now been included in the remuneration contract of present CEO

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[93] Reena Grover & Alok Sonker, Corporate governance voluntary guidelines: A new beginning, Business Standard (25, Jan, 2013).
https://www.business-standard.com/article/companies/corporate-governance-voluntary-guidelines-a-new-beginning-111020300106_1.html. accessed on 05, August, 2018.

[94] Rica Bhattcharyya and Sachin Dave, Lesson from Satyam: Corporate governance evolves not execution, The Economic Times (07 Jan 2016)
https://economictimes.indiatimes.com/news/company/corporate-trends/lesson-from-satyam-corporate-governance-evolves-not-execution/articleshow/50476372.cms. accessed on 05, August, 2018.

[95]Shally Seth Mohile and Anirudh Laskar, Tata Motors shareholders reject proposals executive pay, Livemint (04, Jul, 2014)
https://www.livemint.com/Companies/r2bfqMfLmzHLPQzOsJXQwJ/Tata-Motors-shareholders-reject-remuneration-proposals-for-t.html. accessed on 05, August, 2018.

[96]id.

[97]id.

[98] Soumya Kanti De Mallik and DebarupaAgarwala, Executive Compensation in India: Summing up the Infosys Controversy, HSA Advocates (09, June, 2017)
https://www.hsalegal.com/2017/06/09/executive-compensation-in-india-summing-up-the-infosys-controversy/. accessed on 05, August, 2018.

[99]id.

[100]id.

[101] Sindhu Bhattacharya, Compassionate capitalism: Why Murthy is right in opposing Infy CEO Vishal Sikka's pay hike, Firstpost (14, Feb, 2017)
https://www.firstpost.com/business/compassionate-capitalism-why-murthy-is-right-in-opposing-infy-ceo-vishal-sikkas-pay-hike-3282544.html. accessed on 05, August, 2018.

[102] Varun Sood and Anirban Sen, Infosys CEO Salil Parekh's contract leaves no room for Vishal Sikka-type spat, Livemint (27, Mar, 2018)
https://www.livemint.com/Companies/NEOJhgLylhw5pAZv6zBLnL/Infosys-CEO-Salil-Parekh-contract-leaves-no-room-for-Vishal.html. accessed on 05, August, 2018.

of Infosys, Salil Parekh[103]. This Release of Claims clause will ensure that Salil Parekh is not paid more than what was promised when his tenure will end in 2023[104].

IVth Part: Conclusion and Suggestion

The International scene in regard to Corporate Governance has made significant improvements. India has also improvised and brought in several Corporate Governance principles in its legal system. In regard to executive remuneration we have seen progressive developments like mandating presence of remuneration committee for listed companies, bringing in stringent disclosure norms, promoting remuneration packages based on stock options and bonuses with claw back provisions, making provision in regard to shareholders approval for any executive remuneration policy exceeding 11% of net profit of the company, etc..

The progress made by Indian Corporate Governance Scene is significant, however there is still a lot to be done and fixed. A more progressive approach should be followed like the practice of including Release of Claims Clause and introduction of a non-compete clause for a short term as done by Infosys while formulation remuneration contract for Salil Parekh. In 2018, Uday kotak Committee under the Chairmanship of Uday Kotak, the Managing Director of Kotak Mahindra Bank, gave its recommendations in regard to Corporate Governance in India. Many of the suggestions made therein tries to buttress the foundation of Corporate Governance.

Uday Kotak Committee has made suggestions to strengthen the position of Independent Directors in a company. This becomes very important in regard to executive remuneration as at least half of the members of nomination and remuneration committee are independent director. A more independent remuneration committee will ensure a more independent remuneration policy. The committee has also suggested separation of position of non executive chairperson of a company and MD/CEO of a company. It will result in reducing excessive authority in a single individual. Therefore, there would be less chances of influencing formulation of remuneration policy. The committee has also made suggestion that the remuneration committee should have two-third of its members as independent directors. All these steps will ensure that the remuneration committee will be able to construct a remuneration policy with least influence from outside the committee.

The committee has also made suggestions in regard to accounting and auditing. An improved accounting and auditing system will prevent scandals like Satyam and Enron.

There are some aspects that remain untouched by the Uday Kotak Committee like the role of Remuneration Consultants. At present there is no provision in regard to Remuneration Consultants in Indian Legal System, however, as a practice many company seek appoints remuneration consultants. A robust practice in regard to remuneration consultant would make the procedure of formulation executive remuneration more transparent and accountable.

'Say on pay' is another aspect that needs to be strengthened in India. In India there is legal provision under section 197 that if the remuneration of top executives of a company exceeds 11% of net profit of the company then such a remuneration policy would be subject to the approval of shareholder. We can introduce a non binding vote on remuneration policy by the shareholders. This will discourage the company to make an inapt remuneration policy as even

[103] id.
[104] id.

a non binding vote will express the dissent of shareholders over the remuneration policy of the company. In case of BP group a non binding vote ultimately resulted in reduction of salary of its CEO, therefore this provisions can act as a strong safeguard mechanism. The experience of French Corporate Legal System can also be incorporated in India, whereby a provision can be introduced to allow investors to cast an ex ante (backward looking) vote on the remuneration policy of the executives to approve or disapprove the variable remuneration promised to the executives of a company. This will prompt the executives to act more cautiously.

India can also set an independent body like U.K. high pay centre. This body basically looks into the cases where high reward is given to the executives. The presence of this body makes the process of awarding high remuneration packages more accountable. Besides this, it also creates awareness among investors in regard to the practices followed by various companies in relation to executive remuneration. This body also flags companies where there is opposition of remuneration policy by more than 20% shareholders. Similar provision can also be made in Indian Corporate Legal System as well. This will discourage formulation of excessively inordinate remuneration policy.

An Analysis of the Relationship between Company Performance & Independent Directors

~ Shreshth Balachandran*

Abstract

To counter the failure of the management, concepts of independent directors and inclusion of more women directors were beginning to resonate in the international community. USA & UK have been credited with the introduction of the concept of Independent Director to the modern corporate governance. So, it won't be wrong to assert that the idea of such directorship has risen from obscurity to ubiquity in the west and has been applied as the need has been by other countries, especially the Asian countries. It was in the 1970s when Independent Directors were introduced to the boardroom in USA. Since then, the judicial and legislative response to every corporate scandal has been Independent Directors. This reliance can be established by the fact that there are currently 85% of Independent Directors serving in boards in USA and 60% are CEOs. Slowly and steadily, this concept resonated in the legislations of other countries as well. Different approaches were adopted by countries according to the suitability. United Kingdom followed a principle-based approach whereas India with the amendment of the Companies Act 2013 introduced the same in the act. The aspect which is important to understand is that is there any empirical evidence to support better financial performance to the company with the appointment of an independent director.

Keywords: Independent Directors, Failure of management, Financial performance, Principle-based approach, Companies Act 2013.

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Introduction

USA & UK have been credited with the introduction of the concept of Independent Director to the modern corporate governance. So, it won't be wrong to assert that the idea of such directorship has risen from obscurity to ubiquity in the west and has been applied as the need has been by other countries, especially the Asian countries. It was in the 1970s when Independent Directors were introduced to the boardroom in USA. Since then, the judicial and legislative response to every corporate scandal has been Independent Directors. This reliance can be established by the fact that there are currently 85% of Independent Directors serving in boards in USA and 60% are CEOs.[1]

Mirroring the actions of USA, UK around 25 years ago introduced the concept. Now currently 90% of the directors in boards of public companies are Independent Directors.[2] As UK began making the concept an integral part of their principle-based regime, even EU realised the benefits of the concept. They made it as a fundamental principle of their corporate governance regime as a 'must have' concept. This was highlighted in Sec 5 of the final draft of the European Model Companies Act, 2015 wherein "the board [of a traded company] should comprise an appropriate balance of independent non-executive directors."[3]

Going beyond the framework of nations, OECD in 2013 came out with a report on 'Better Policies for Board Nomination in Asia' wherein the importance of an Independent Director in appointing committees in a company in Asian companies was addressed.[4] Also in another report in 2015 (G-20/OECD Principles of Corporate Governance) it was recommended that all the important tasks of a company shall be supervised by an Independent Director.[5] In similar lines ACGA (Asian Corporate Governance Association) recommends that their shall be sufficient number of Independent Directors in a company.[6]

[1] U. Velikonja, 'The Political Economy of Board Independence', North Carolina Law Review, 92 (2014), 855, 857 f. with further references. See infra Part III.5.
[2] Heidrick and Struggles, Corporate Governance Report 2009. Boards in turbulent times 45, (2009).
[3] European Model Company Act Group, The European Model Company Act (EMCA) Draft 2015, http://law.au.dk, (Mar. 9th 2018, 21:00 Hrs).
[4] Better Policies for Board Nomination in Asia (OECD Publishing 2013), http://dx.doi.org/10.1787/9789264204386-en, (Mar. 9th 2018, 21:13 Hrs).
[5] The G20/OECD Principles of Corporate Governance (OECD Publishing 2015), http://dx.doi.org/10.1787/9789264236882-en, 50, (Mar. 4th 2018, 21:10 Hrs).
[6] ACGA, Rules & Recommendations on the Number of Independent Directors in Asia, http://www.acga-asia.org, (Mar. 9th 2018, 21:17 Hrs).

Jurisdiction	Requirements on separation of the CEO and Chair of the board	Requirements on the election of independent directors to the board by law or regulations	Minimum number or ratio of independent directors	Does the definition of "independence"? exclude persons who are/were			
				Related to management	Related to major shareholder	Employees of affiliated companies	Representatives of companies having significant dealing with the company
Bangladesh	Yes	Yes (Listed Companies)	20%	Yes	Yes	Yes	Yes
China	No	Yes	1/3	Yes	Yes	Yes	Yes
Chinese Taipei	No	Yes (Listed Companies)	20% or no less than 2	Yes	Yes	Yes	Yes
Hong Kong	No: Under the Companies Ordi	Yes	3 & 1/3	Yes	Yes	Yes	Yes

	nance[7]						
India	Yes (Dual board system)	Yes	1/3 or 50%	Yes	Yes	Yes	Yes
Indonesia	No	Yes	30% or 50%[8]	Yes	Yes	Yes	Yes
Korea	No	Yes	>3 + majority or 25%[9]	Yes	Yes	Yes	Yes
Malaysia	Yes	Yes	1/3 or 2	Yes	Yes	Yes	Yes
Mongolia	Yes	Yes	1/3	Yes	Yes	Yes	Yes
Pakistan	No	Yes	1 Mandatory or 1/3 preferably[10]	Yes[11]	Yes	Yes	Yes
Philippines	No	Yes	2 or 20%	Yes	Yes	Yes	Yes
Sin	No	Yes	1/3	Y	Y	Y	Yes

[7] However, under the Corporate Governance Code in the Listing rules it is a code provision (which listed companies must comply with or explain any deviations) that the roles of chairman and chief executive should be separate and should not be performed by the same individual.

[8] Minimum 30% of total board of commissioner (two-board system); for banking minimum independent director 50% of total board of commissioner.

[9] Major companies: at least three directors and the majority of the BOD; smaller ones: 25%

[10] 50% required when the Chairman and the CEO are not independent.

[11] The Code of Corporate Governance 2012 (Clause 1(b) bullet point 5) does exclude close relative of the company's promoters, directors or major shareholders from definition of independence.

gap ore			or 2	es	es	e s	
Tha ilan d	No	Yes	3 or 1/3	Y es	Y es	Y e s	Yes
Viet nam	No	Yes	1/3	Y es	Y es	Y e s	Yes

Table[12]

From this table it is very easily established that there has been a sharp increase in the number of countries opting to switch to a framework allowing for Independent Directors.[13] There is a variety in the approaches which countries opt for. Some follow a hard law system, wherein they amend their legal framework to accommodate such changes. Others may opt for a rule, principle or code-based system.[14]

Role of an independent director would change from country to country. This is attributed to the varies ownership structures, unique shareholder structures, financial substitutes, institution, regulation history & culture.[15] But to further understand the concept of independent director, it important to make an analysis of the concept and simultaneously understand how other jurisdictions have understood, interpreted and incorporated it.

Who is an independent director?

In simple terms, any director who is not related to the company in any financial or through family or any other interest is known as an independent director. But the abstract definition then becomes a little complicated as there is a level uncertainty as to who is independent.[16] One definition can be such that it depends on the functions which an independent director does within the company, but this sort of a definition is not an end but is constructed to serve a pre-defined goal.[17]

The main task which an independent director does is that of to solve the classic agency conflict between managers and dispersed shareholders. Such a definition is opined to predominantly protect the minority shareholders against

[12] OECD Survey of Corporate Governance Frameworks in Asia, (2017).
[13] H. Baum, S. Kozuka, L. R. Nottage and D. W. Puchniak (eds.), Independent Directors in Asia: A Historical, Contextual and Comparative Approach, Cambridge University Press (2017).
[14] *Ibid.*
[15] A. N. Licht, 'Culture and Law in Corporate Governance', in P. Richman, J. Gordon and W.-G. Ringe (eds.), The Oxford Handbook of Corporate Law and Governance, Oxford University Press (2017).
[16] P. L. Davies and K. J. Hopt, 'Boards in Europe: Accountability and Convergence,' American Journal of Comparative Law, 61, 301, 317, (2013).
[17] P. L. Davies, K. J. Hopt, R. Nowak and G. van Solinge (eds.), Boards in Law and Practice, Oxford University Press, 28 ff, (2013).

controlling block holder as found in an archetypical continental European company or in many Asian countries as well.[18]

It is also important to understand that there is no universal definition when it comes to independent directors and countries have applied a combination of the criteria to what jurisdictions and legislative bodies recognised as important.[19]

Independent directors have multiple and diverse functions relative to the board. They play a variety of roles depending upon the primary functions of the board which in turn is dependent on the resultant agency problems within the company.[20] Their functions are heavily path-dependent.[21] Among such diverse ideas, one common factor is that such directors are non-executive directors meaning that they do not take part in the management of the company.[22] But not all non-executive directors are independent directors.

Therefore, the theoretical and practical considerations of the concept do not always take such nuances into account in analysing independent director and nor the conditions to consider independence.[23] Such lack of consideration to the concept can be attributed to the ubiquity of the statutes, rules and corporate governance codes which have studies little about the nature of independence.[24] An integral paradox to this nature of independence which is often ignored is that 'independence creates dependence.' This simply means that even independent directors have to rely on insiders within the company to obtain information.[25]

The role of an independent director is monolithic, universal and fixed with the addition of the fact it has always been axiomatically assumed that more independent directors entails better corporate governance.[26] How does such independence assure improvement in corporate governance is rarely scrutinised and done on blind faith alone. This flawed perspective converts into being a hinderance to the much-required consideration of how many independent directors are to be a part of the board.[27] Not until till much recently after the 2008 financial crisis that European nations began dwelling

[18] Harald Baum, The Rise of the Independent Director: A Historical and Comparative Perspective, Max Planck Private Law Research Paper No. 16/20, (2017).
[19] M. Belcredi and G. Ferrarinic(eds.), Boards and Shareholders in European Listed Companies. Facts, Context and Post-crisiscReforms, Cambridge University Press, 191, (2013).
[20] R. B. Adams, B. E. Hermalin and M. S. Weisbach, 'The role of directors in corporate governance: a conceptual framework and survey', Journal of Economic Literature, 48, 58, (2010).
[21] K. J. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation', American Journal of Comparative Law, 59, 1, (2011).
[22] D. C. Clarke, 'Three Concepts of the Independent Director', Delaware Journal of Corporate Law, 32, 73, 79, (2007).
[23] *Ibid*, 73.
[24] S. Le Mire and G. Gilligan, 'Independence and Independent Company Directors', Journal of Corporate Law Studies, 13, 443, (2013).
[25] E. Wymeersch, K. J. Hopt and G. Ferrarini (eds.), Financial Regulation and Supervision: A Post-Crisis Analysis Oxford University Press, 368, 376, (2012).
[26] *Supra Note* 17.
[27] M. Gutiérrez and M. Sáez, 'Deconstructing Independent Directors', J. Corp. L. S., 13 63, (2013).

into discussions about independent director's nature[28]. On the other hand, U.SA still believes that independent directors are the panacea of all the corporate governance shortcomings.[29]

The world is introduced to the concept

It was in 1934 when William O. Douglas published a paper called *'Directors who do not Direct'*[30] in which it was first highlighted that the reason for many corporate scandals in the 1920s and 30s was the directorship of the company. The complete passivity of the board was blamed for such scams. It was pointed out that the boards are the only means of protecting shareholders.[31] But such directors in the scams referred only provided illusionary support to the shareholders. Such scams came to be since managers in the companies became their own supervisors and the shareholders moved to a position of subservience.[32] This can be said to be the first ever agency conflict. Douglas was the first person to discuss the fact that the directors in the company have many different roles to fulfil within the company. It was here where he proposed that there must a rudimentary version of independent directors who played an important & prominent role in the company.[33]

The earliest form of legislation to this effect was the Investment Company Act, 1946 which was mostly like an outlier for several decades. In reality, inside directors dominated the boards of the company. Non-executive directors were not made employees of the companies, but they slowly outnumbered them in the later years and it took a while for such directors to be independent which only happened until recently. During that time, these directors were not independent but were affiliated with the management of the company by interlocking financial relationships and directorships.[34] Subsequently, the managerialist model dominated the corporate governance of USA in the 1950s.[35]

Major changes came as came the 1970s[36] with certain important events. These were: -

1. Penn Central Case
2. Watergate Scandal
3. Book by Ralph Nader *"Taming the Corporate Giant"*[37]

[28] J. R. Brown, Jr., 'The Demystification of the Board of Directors', University of Denver Sturm College of Law, Legal Research Paper Series, Working Paper No. 14-37 (2014), http://ssrn.com/abstract= 2474394, (Mar. 11th 2018, 12:17 Hrs).
[29] E. J. Pan, 'Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine', Florida State University L. Rev. 38, 209, 225, (2011).
[30] W. O. Douglas, 'Directors Who Do Not Direct', Harvard L. Rev., 47, 1305, (1934).
[31] *Ibid.* 1307.
[32] *Ibid.* 1308.
[33] L. E. Mitchell, 'The Trouble with Boards', in F. C. Kieff and T. A. Paredes (eds.), Perspectives on Corporate Governance, Cambridge University Press, 17, 25, (2010).
[34] M. L. Mace, Directors: Myth and Reality, Boston: Division of Research, Graduate School of Business Administration, Harvard Univ., 86 ff, (1971).
[35] A. D. Chandler, The Visible Hand: The Managerial Revolution in America, 16th edn., Cambridge, Mass: Belknap Press of Harvard Univ. Press, (2002).
[36] *Supra Note* 34.
[37] R. Nader, M. (J.) Green and J. Seligman, Taming the Giant Corporation, New York: Norton, (1976).

The first two were corporate scandals which shook the nation quite badly. The other was an academic publication, which is surprisingly depressing as such publications rarely garner reforms in the system.

In the Penn Central Case, a major railway company in the '70s, the directors were completely unaware of the financial plight and irregularities in the company and not surprisingly enough, they were found not following their duty to gather relevant financial information of the company.[38]

The Watergate scandal was quite shocking as many companies were found to have made questionable payments in the name of political contributions.[39] The role of corporations making contributions came under scrutiny and was a subject of a heated political debate.[40] It was then when Ralph Nader in his book illustrated that such incidents were the reason for the social ills plaguing USA.[41] This created a lot of pressure on companies to reform their boards as many from the outside perceived them to be dysfunctional. But, such arguments made by Nader never materialised.[42]

It was the work of Melvin Eisenberg[43] which set the tone for independent directors to be staffed in boards. In his book, *'The structure of Corporations'* he introduced a concept called the monitoring model. According to him, there were some functions which a director had to fulfil, more specifically to monitor, appoint, remove member of the board.[44] He believed that since these functions were not being carried out by the boards previously, corporate scandals were much likely to occur. He regarded such monitoring functions to be more important that merely pro forma based.[45] In his view it was important for such directors to be completely free from the executives and must strive to obtain all relevant information to be able to truly monitor the board.[46]

By the latter half of the '70s, due to such advances, the board at least started staffing independent directors. It was also during the same time in 19760 when NYSE (New York Stock Exchange0 began making requisite changes to their listing agreements.

Again in 1982, the issue came up when American Law Institute proposed the Draft Principles of Corporate Governance. Eisenberg was a member of the said committee and he tried to ensure that his vision of having a monitoring model would be met with. But, only the idea of having the directors being separated from the management where met with acceptance. The proposal was

[38] SEC Staff Study of the Financial Collapse of the Penn Central Co.: Summary (1972-73 Transfer Binder), Fed. Se. L. Rep. (CCH) ¶ 78,931 (1972).
[39] J. N. Gordon, 'The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices', Stanford L Rev., 59, 1465, 1511, (2007).
[40] S. M. Bainbridge, Corporate Governance After the Financial Crisis (Oxford University Press, 51, (2012).
[41] *Supra Note* 37. 62.ff.
[42] S. M. Bainbridge and M. T. Henderson, 'Boards-R-Us: Reconceptualizing Corporate Boards', Stanford L. Rev., 66, 1051, (2014).
[43] M. A. Eisenberg, The Structure of the Corporation: A Legal Analysis, Boston: Little, Brown & Co., (1976).
[44] *Ibid.* 62.
[45] *Ibid.* 57.
[46] *Ibid* 170.

to make such principles mandatory, but the only tuned out to be mere recommendations.[47]

The outcome of the reforms 1970s was mixed.[48] The managerial elites had made serious concessions, but somehow retained the eventual controlling powers of the board. in hindsight, these actions by the boards seem to be done in an effort to shield the directors from serious threats of legal liability, which they were eventually successful in doing.[49]

By the 1990s there was a shift in the attitude of the corporate community where maximising shareholder value was the new goal for all companies. Now, stakeholder capitalism and inside dominated directors were a thing of the past. At the turn of the century, there were 78% independent directors in companies and out of them 23% of them had non-executive chairman.[50] The monitoring model had taken its roots in the country.

Surely, it was not going to be the cure to all corporate scams, which was proven with the Enron, WorldCom and other corporate failures. The most worrying factor was that these scams were eerily similar to the Penn Central case. The only point of difference is that, this time the boards were comprised of independent directors.[51] In the present cases the failure of such form can be attributed to the failure of the accounting and audit committee. But, what this did was to bring to light the inherent flaws which were there in the system of the independent director monitoring model.[52]

The answer to these problems by the US Congress was they empowered the SEC further into setting adequate standards to make changes to the listing requirements. With this they passed the Sarbanes-Oxley Act in which they codified the monitoring model.[53] Also, later, after the 2008 financial crisis, the Dodd-Frank Act of 2010 was passed which further enhanced the role of an independent director. These changes were made only with respect to public companies.[54]

Thus, the primary functions of the boards of the directors in the boards became to control, manage and monitor the performance of the board.

Among the various legal changes which were made, one of the most important one was of super-majority boards, where only one remaining inside was not

[47] Liebowitz SJ and Margolis SE 'Path Dependence, Lock-In and History' 11 Journal of Law, Economics and Organization 205, (1995).
[48]Bebchuk LA and Roe MJ 'A Theory of Path Dependence in Corporate Ownership and Governance' 52 Stanford L. Rev. 127, (1999).
[49] William C. Greenough & Peter C. Clapman, Role of Independent Directors in Corporate Governance, 56 Notre Dame L. Rev. 916 (1981), http://scholarship.law.nd.edu/ndlr/vol56/iss5/11, (Apr. 20th 2018, 09:05 Hrs)

[51] The head of Enron's audit committee was a professor of accounting at Stanford University whom one might regard as highly qualified for the job.
[52]*Supra Note* 39, 1535, 1538.
[53]*Supra Note* 40, 59.
[54] Section § 303 A, NYSE Listed Company Manual 2016, http://nysemanual.nyse.com/lcm, (Mar. 15th 2018, 11:33 Hrs).

independent in nature. By 2013, 60% of the public companies had such a boards structure and 85% of them were independent directors.[55]

Now, one might argue that why would you even have that one director left in the board, but the fact of the matter is that for the independent director to function efficiently, he requires relevant information regarding the company, which only an inside director can provide him, hence getting rid of inside directors all together is not an option also.[56] Therefore, in this way, independency creates dependency.[57]

Inspired UK takes the lead in Europe

Shareholdings in UK are not concentrated but are semi-dispersed with institutional investors now holding 50% of the shares alongside the domestic shareholders.[58] But. Unlike the shareholders in US, in Britain, they are much more powerful. They yield greater power when it comes to nominating or removing directors, install a new board, etc.[59] The difference doesn't end here. Unlike the US, in UK, much importance is given to laws made by statutory bodies rather than legal ones.[60] Accordingly, their Companies Act 2006 has little mention to structure of the board, composition and its functions.[61] The main legislation which deals with corporate governance is the UK Corporate Governance Code which is controlled and administered by the Financial Reporting Council.[62] This code imbibes the reasoning of having independent directors to control and manage the board. But rather than having a hard law, they follow a comply and explain mechanism which allows the companies to deviate from these responsibilities entirely. This principle is enforceable by the listing rules of the London Stock Exchange. It must be understood that the adoption of such norms by UK is fairly recent.[63]

In the light of the above statement it would also be relevant to mention that this rise and demand for independent directors was not made by the government but by the industry. They promoted the idea of having non-executive directors monitoring the role of the company.[64] The demand for such directors picked up pace when the committee on the Financial Aspects of Corporate Governance was formed in 1992 under Sir Adrian Cadbury.[65] The committee was formed under the backdrop of many corporate scandals which

[55] K. Greenfeld, 'The Third Way: Beyond Shareholder or Board Primacy', Seattle University L. Rev., 37, 749, (2014).
[56] *Ibid.*
[57] L. Bebchuck, 'The Case for Increasing Shareholder Power', Harvard Law Review, 118, 833, (2005).
[58] P. L. Davies, 'Shareholders in the United Kingdom', ECGI Working Paper No. 280/2015.
[59] P. L. Davies and S. Worthington, Gower and Davies' Principles of Modern Company Law, 9thedn., London: Sweet and Maxwell, 436, (2012).
[60] in P. L. Davies, K. J. Hopt, R. Nowak and G. van Solinge (eds.), Boards in Law and Practice Oxford University Press, 713, 714, (2013).
[61] *Ibid.* 716.
[62] Financial Reporting Council, The UK Corporate Governance Code (September 2014), http://frc.org.uk, (Mar. 16th 2018, 13:13 Hrs).
[63] B. R. Cheffins, 'The Rise of Corporate Governance in the UK: When and Why', Current Legal Problems (2015), http://dx.doi.org/10.1093/clp/cuv006, (Mar. 16th 2018, 13:20 Hrs).
[64] Y. Zhao, Corporate Governance and Directors' Independence, Alphen aan den Rijn 11, (2011).
[65] B. R. Cheffins, 'The History of Corporate Governance', ECGI Law Working Paper No. 184/2012, http://ssrn.com/abstract=1975404, 19 (Mar. 16th 2018, 13:23 Hrs).

took place until 1991. The problem which the committee felt was that a single highly powered CEO yielded too much power causing corporate governance problems in a company. Accordingly, the Cadbury Code for Best Practices[66] proposed that to solves such issues, sufficient number of non-executive directors must be staffed in a company (minimum 3).[67] Some of the elements in the code were inspired from US, which was the first mover.[68] Subsequently, with UK getting a move on, 6 years later in 1998 the recommendations of the Cadbury Committee were reviewed and were merged with the Greenbury Committee report of 1995 by the Hampel Committee.[69] After this these were combined into the Higgs Report of 2003 to form a consolidated Combined Code in 2006.[70] It was recommended in this code that half of the members in boards now should be independent non-executive directors in large public companies.

In the years between 2001 and 2009 the number of independent directors in the company hovered around 90%.[71] In 2010 the combined code was transformed into the UK Corporate Governance Code. In this code the strong emphasis on independent non-executive directors to be the solution to the unyielding power small group of individuals dominating the board poses to the boards be now comprised with directors with appropriate skills, expertise, independence and knowledge[72] to enable them to fulfil their responsibilities and duties.[73] This particular legislation proved to be counter-productive as the number of independent directors subsequently dropped to 61%.[74]

The major regulatory changes came in 2009 with the Walker Review[75] in the wake of the global financial crisis. They recommended that it is not necessary for the companies to strictly follow the rule of having half of the members in their board as independent. They shall look for directors with relevant experience & expertise in the field.[76]

[66] C. Jordan, 'Cadbury Twenty Years on', Villanova L. Rev., 58, 1, (2013).
[67] *Supra Note* 58, 738.
[68] *Supra Note* 63, 3.
[69] P. L. Davies and S. Worthington, Gower and Davies' Principles of Modern Company Law, 9thedn., London: Sweet and Maxwell, 436, (2012).
[70] K. J. Hopt, 'Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default
Rules?', ECGI Law Working Paper 312/2016, http://ssrn.com/abstract=2749237 or http://dx.doi.org/10.2139/ssrn.2749237, /, (Mar. 16th 2018, 13:35 Hrs).
[71] M. Roth, 'UnabhängigeAufsichtsratsmitglieder', Zeitschriftfür das gesamteHandels- und Wirtschaftsrecht, 175, 605, 611, (2011).
[72] Main Principle A3, Combined Code 2006.
[73] Main Principle B, Corporate Governance Code 2014. The Principle is the same in the 2010, 2012, and 2014 editions of the CGC.
[74] *Supra Note* 71, 59.
[75] Sir David Walker, A Review of Corporate Governance in UK Banks and Other Financial Industry Entities (2009), www.hm-treasury.gov.uk, (Mar. 17th 2018, 11:36 Hrs).
[76] S. M. Le Mire, 'Independent Directors: Partnering Expertise with Independence', J. of Corp. L. S., 16, 1, (2016).

The interesting thing is post the reform, there was a discontinuity of the US model of strict independence. This has widened the gap between the US & European market form 19% to 40%.[77]

The shift from independence to competence to expertise was a quick and a rather pragmatic decision in response to the Global Financial Crisis of 2008.[78] This sort of quick shift approach taken by UK is probably why their corporate governance model is considered to be an international success.[79] Even though UK was a little late in implementing the independent director model within their framework which was pioneered by US, it still made considerable changes to the system to make it work within their framework of regulations and laws to bring out the best and most effective Corporate Governance model.

India's step forward

In India, it took a while for the concept of independent directors to take shape. As seen in other jurisdictions such as US & UK it took a corporate scandal to make the legislators realise the lacunas in the system. In India's case, it was the Satyam scam[80] which led to the requisite changes being studied and made to accommodate for independent directors within our legal framework.

Subsequent to this in 2009, CII convened a task force on corporate governance which looked into *"recommend ways of further improving corporate governance standards and practices in both letter and spirit."* Naresh Chandra led committee termed the Satyam episode to be a one-off incident and stated that the Indian framework was well to do. Basically, what they meant to say was that the majority of businesses in India were run in a sound & legal manner.[81]

Similar efforts were made by ICSI[82] and NASSCOM under the chairmanship of NR. Naraynmurthy to formulate a much more comprehensive set of norms

[77] M. Belcredi and G. Ferrarini (eds.), Boards and Shareholders in European Listed Companies. Facts, Context and Post-Crisis Reforms, Cambridge University Press, 191, (2013).

[78] H. S. Birkmose, M. Neville and K. E. Sørensen (eds.), Boards of Directors in European Companies: Reshaping and Harmonising their Organisation and Duties, Kluwer Law International, Alphen aan den Rijn, 241, 250, (2013).

[79] J. L. Hansen, 'Active Owners and Accountable Directors', Kluwer Law International, Alphen aan den Rijn, (2013).

[80] This was perhaps India's biggest corporate fraud case where M/s Satyam Computer Services Limited (M/s SCSL) caused loss to the investors to the tune of Rs. 14,162 crores. The company head, Ramalinga Raju and members of his family secured illegal gains to the tune of about Rs. 2,743 crores by various tricks. The fraud was perpetrated by inflating the revenue of the company through false sales invoices and showing corresponding gains by forging the bank statements with the connivance of the Statutory and Internal Auditors of the company. The annual financial statements of the company with inflated revenue were published for several years and this lead to higher price of the scrip in the market. In the process, innocent investors were lured to invest in the company. Attempts were made to conceal the fraud by acquiring the companies of kith and kin, http://cbi.nic.in/fromarchives/satyam/satyam.php, (Mar. 17th 2018, 20:54 Hrs).

[81] Corporate Governance: Recommendations for Voluntary Adoption, Report of the CII Task Force on Corporate Governance (2009), http://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf, (Mar. 17th 2018, 21:04 Hrs).

[82] Institute of Company Secretaries of India, ICSI Recommendations to Strengthen Corporate Governance Framework (2009),

for the best corporate governance practices. Taking inspiration from such recommendations, the ministry of corporate affairs then came up with the National Voluntary Guidelines of 2009.[83]

Probably the most significant of all advancements was made by the Clause 49 of the Listing Agreements[84] which were framed by SEBI which was passed in 2004 and was modified several times by 2009. They set out the requirements for having independent directors, defined what independence is and laid out specific duties and liabilities of such directors.

In furtherance of these advancements, the amendment of the Companies Act, 2013[85] was the most important one. It led to wave of changes being formally introduced in the principle governing legislation of companies in India.

Clause 49 Article I (A) (iii)	**CompaniesAct 2013, Section 149 (6)**
An independent director is a nonexecutive of the firm who: a. apart from receiving director 's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director; b. is not related to promoters or persons occupying management positions at the board level or at one level below the board; c. has not been an executive of the company in the immediately preceding three financial years; d. is not a partner or an	An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director, — (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience; (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company; (ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company; (c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters,

http://www.mca.gov.in/Ministry/latestnews/ICSI_Recommendations_Book_8dec2009.pdf, (Mar. 17th 2018, 22:01 Hrs).

[83] Corporate Governance Voluntary Guidelines, 2009, Ministry of Corporate Affairs, Government of India, (24 December 2009), http://www.mca.gov.in/Ministry/latestnews/CG_Voluntary_Guidelines_2009_24dec2009.pdf, (Mar. 17th 2018, 22:04 Hrs).

[84] Corporate Governance in listed Companies - Clause 49 of the Listing Agreement, https://www.sebi.gov.in/legal/circulars/oct-2004/corporate-governance-in-listed-companies-clause-49-of-the-listing-agreement_13153.html, (Mar. 18th 2018, 20:58 Hrs).

[85] Companies Act 2013, Section 149 (6).

executive or was not partner or an executive during the preceding three years, of any of the following: i. the statutory audit firm or the internal audit firm that is associated with the company, and ii. the legal firm(s) and consulting firm(s) that have a material association with the company. ii. the legal firm(s) and consulting firm(s) that have a material association with the company. e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director; f. is not a substantial shareholder of the company i.e. owning two percent or more of the block of voting shares	or directors, during the two immediately preceding financial years or during the current financial year; (d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year; (e) who, neither himself nor any of his relatives— (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed; (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of— (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or (B) any legal or a consulting firm that has or had any transaction with the company, its holding,

	subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm; (iii) holds together with his relatives two per cent. or more of the total voting power of the company; or (iv) is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or (f) who possesses such other qualifications as may be prescribed.

It may be observed that Clause 49 tends to cover specific instances which would entail a director to be independent. Such as pecuniary interests, whereas in the case of Companies Act 2013, it manages to cover a broader outlook than Clause 49. It imbibes instances similar to Clause 49 but adds and modifies it further to cover a wide range of perspectives.

Independent Directors and their relation to financial performance

One of the aspects of having Independent Directors in the board is for the adequate representation of the shareholders in the board and the protection of them as well. But the question that remains unanswered is that is there empirical evidence which points to the fact that board independence reflects in higher performance of the company.

Bhagat & Black in 1999[86] did the first large sample and long horizon study of this fact in American firms. The principal result of the study was that generally low profit earning companies tend to tilt towards having a much more independent board (we observed the same pattern of behaviour among American firms while studying the evolution of Independent Directors as well). They found out that there is no link between a higher performance of the firm with respect to independence of the board.[87] Therefore they concluded

[86] BOARD INDEPENDENCE AND LONG-TERM FIRM PERFORMANCE, Sanjai Bhagat and Bernard Black (1 February 2000).
[87] *Ibid*, 3.

their study by saying that there is no empirical support for this fact and the age-old wisdom of having independent boards is unsubstantiated.

Generally, there are two approaches which researchers follow to trace this link. One, is to study how the board composition affects the board's behaviour in discrete tasks[88] such as appointment of CEO or awarding golden parachute.[89] The researchers in the above study traced the direct link between the performance of the firm with board independence.

There was another study which was conducted by Rosenstein and Wyatt (Event Study) which noted a 0.2% increase in the stock price of companies when there is an outside director appointed.[90] This increase may be statistically significant but not economically.[91] This may rather have a signalling effect that would show that the company plans to address its problems via such measures.[92]

Klein in her study found that companies have an improved performance once when such directors serve on investment committees. But she could not find any such correlation in monitoring committees (Such as audit committees) which are more often than not dominated by independent directors.[93]

Similarly, Peng by sampling 530 Chinese firms found out that a firm's performance being affected by appointment of an independent board is not robust. He specifically analysed firms which were going through a series of financially poor performances. He found out that either the link is positive or insignificant.[94]

Kumar and Siva Ramakrishnan[95] while making their analysis found out that monitoring efficiencies are reduced as independent directors become less and less dependent on CEO's. Roman Horvath and PersidaSpirollari[96] also in their study got negative results. They found out that an independent director worsens the performance of a company, especially during a crisis or economic slowdown (since this study was done by analysing the firms performance from 2005-2009).

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[88] Michael S. Weisbach, Outside directors and CEO turnover. Journal of Financial Economics, 20, 431-460, (1988).
[89] *Supra Note 86*, 5.
[90] Stuart Rosenstein & Jeffrey G. Wyatt, Outside Directors, Board Independence, and Shareholder Wealth, 26 J. FIN. ECON. 175 (1990).
[91] The Non-Correlation Between Board Independence and Long-Term Firm Performance, Sanjai Bhagat & Bernard Black, 27 J Corp. L. 231-274 (2001).
[92] *Ibid.*
[93] April Klein, Firm Performance and Board Committee Structure, 41 J.L. & ECON. 275, 286-88 (1998).
[94] M. Peng, "Outside Directors and Firm Performance during Institutional Transitions." Strategic Management J., Vol. 25, No. 5, pp. 453–471, (2004).
[95] Kumar, P., Sivaramakrishnan, K, "Who Monitors the Monitor? The Effect of Board Independence on Executive Compensation and Firm Value" Rev. of Fin. S., Vol. 21, No. 3, pp. 1371–1401, (2008).
[96] Roman Horváth, PersidaSpirollari, DO THE BOARD OF DIRECTORS´ CHARACTERISTICS INFLUENCE FIRM´S PERFORMANCE? THE U.S. EVIDENCE, PRAGUE ECONOMIC PAPERS, 4, (2012).

Garg in 2007 while studying the same wisdom in India found out that such independence did not guarantee improved firm performance. He attributed this reason to the poor monitoring roles of the independent directors.[97]

Epps and Ismail in their study took samples of companies which had 100% independent nominating and compensation committee. These eventually resulted in the negative discretionary accruals to the firm.[98]

Johani, Jaffar and Hassan concluded in their study that there is no association between board independence and earning management. The companies which they analysed had a higher concentration of independent directors. Therefore, their conclusion was with even a higher concentration of Independent Directors does not increase shareholder return.[99]

Abdul Rahman and Mohommad Ali while doing their study in Malaysia found out that there was insignificant relationship between Corporate Governance mechanisms such as Independent Directors and firms performance. This was because of the dominant role which managers and executive directors play in the board matters.[100]

Similar studies were conducted in Hong Kong as well where there were two different results which were observed. One was that there was no significant association between firm's performance and Independent Directors in family owned firms, but it was the opposite in non-family owned firms which showed a positive relationship.[101]

Another study in New Zealand found out that companies which were listed on the New Zealand Stock Exchange showed a negative association between firm's performance and independent directors.[102]

Therefore, there are a plethora of studies as we have seen which show that there is either no association or a negative one between firm's performance and independent boards. This raises this raises the question as to what the eventual need of is having such directors in place.

Why don't they affect performance?

One of the reasons why having independent directors may not add value to the firm's performance is may be due to the presence of inside directors. By having inside directors within the firm allows for companies to easily appoint

[97] A. K. Garg, Influence of Board Size and Independence on Firm Performance: A Study of Indian Companies, Vikalpa, Vol. 32 No. 3 (July-September 2007).
[98] R. W. Epps & T. H Ismail, Board of directors "governing challenges and earnings management", J. of Acc. Org. Change, Vol. 5 No. 3, pp. 390-416, (2009).
[99] N. H Johari, N. M. Saleh, R. Jaafar, & M. S, Hassan, The Influence of Board Independence, Competency and Ownership on Earnings Management in Malaysia. International Journal of Economics and Management 2(2): 281 – 306, (2008).
[100] R. Abdul Rahman, & F. H. Mohamed Ali, Board, audit committee, culture and earnings management: Malaysian evidence. Managerial Auditing Journal, Vol. 21 No. 7, pp. 783-804, (2006).
[101] S. Leung, G. Richardson, and B. Jaggi, Corporate Board and Board Committee Independence, Firm Performance, and Family Ownership Concentration: An Analysis based on Hong Kong Firms. J. of Contemp. Acc. & Eco. 10 pp. 16-31, (2014).
[102] FauziFitriya& S. Locke, Board Structure, Ownership Structure and Firm Performance: A Study of New Zealand Listed-Firm. Asian Academy of Management Vol. 8 No. 2, 43-67, (2012).

future CEOs.[103] This preference is given to inside directors in companies since they are financially involved with the company, hence their decisions are much more hands on. Since the independent directors own trivial number of shares, there is a genuine lack of impetus in their decisions. Another reason for their preference is that they have much better access to information about the company than an independent director.[104] In short, inside directors are conflicted but well informed whereas independent directors are not conflicted but relatively ignorant.[105] To have a higher rate of performance in the firm, there shall be a mix of such independent and inside directors.[106]

There might be another reason where many of the directors which are appointed are not truly independent. This might happen due them being beholden by the current CEO in a manner to subtle to be termed as an independent.[107] Many directors have been found to have some sort of relation to the CEO.[108] One of the problems is such, that not many legislations in the world talk about such relationship. This hamstring the independence of the director.

One more reason could be the concentration of the director in the said company where he is an independent director. There may be a possibility that he may be the CEO of his own business and is more embroiled in functioning there than the other company where his independent director duty lies. Such directors are "Visibility Directors" are often hold multiple directorship but have limited attributes and are made directors only to fulfil the gender or racial diversity. Such board structure bears no fruit and is many a times found to be counterproductive.

[103]Vancil, Richard F., Passing the baton: Managing the process of CEO selection. Harvard Business School Press, Boston, MA, (1987).
[104]Baysinger, Barry and Henry Butler, Corporate governance and the board of directors: Performance effects of changes in board composition. J. of L., Eco. & Org. 1, 101-124, (1985).
[105]Sanjai Bhagat, and Bernard Black, The uncertain relationship between board composition and firm performance, Business Lawyer 54, 921-963, (1999).
[106] April Klein, Firm performance and board committee structure. J. of L. and Eco. 41, 275-303, (1998).
[107]Holthausen, Robert W. and David F. Larcker, Boards of directors, ownership structure, and CEO compensation, (1993).
[108] David Yermack, Higher market valuation of companies with a small board of directors, J. of Fin. Eco. 40, 185-212, (1996).

IBC - A GAME CHANGING LAW FOR CORPORATE INSOLVENCY

~Himanshu Shembekar*

Abstract

The Insolvency and Bankruptcy Code, 2016 ("IBC") is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for Insolvency and Bankruptcy. IBC Replaces some of the old acts and modifies/amends some provisions of other legislation like SARFAESI, Companies Act, 2013 etc. This code applies to The Company, Limited Liability Partnership(LLP), An individual, Hindu Undivided Family, Partnership firm, Trust andany other entity established under a statute.

The large number of legislations had made recovery of debts and insolvency process a very tedious and time-consuming process. There was a need for a common regulation and a common authority to make the insolvency process easier and also to ensure that the creditors get their money back in a shorter timeframe. IBC was introduced as a remedy tothese existing problems.

The article focuses on IBC with respect to insolvency of companies.

The main purpose of the article is to give a comparative analysis of the winding up of company under the Companies act, 2013 and IBC. For setting the context for the same, article also includes - introduction to IBC, purpose and objective behind the enactment of IBC, explanation of the insolvency process under IBC.

Article gives author's view on why IBC is game changing insolvency law under the present situation. Article concludes with author's view on the areas where the law needs further clarity or improvement.

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IBC - A GAME CHANGING LAW FOR CORPORATE INSOLVENCY

INTRODUCTION TO INSOLVENCY AND BANKRUPTCY CODE

The "Insolvency and Bankruptcy Code (IBC)", 2016was introduced in the Lok Sabha in 2015 by the Finance Minister, Mr. Arun Jaitley. However, the Code was passed by the Parliament in the year 2016. The Code received the assent from Shri Pranab Mukherjee, who was the Hon'ble President of India then, on 28thMay 2016. It was further notified in the Gazette of India on the very same day.

The Code has been amended quite a few times, with the most recent amendment made on 6th June, 2018 by way of an ordinance promulgated by the Hon'ble President, Shri Ramnath Kovind. This amendment settled various issues of public and judicial debates.

REASONS FOR INTRODUCING IBC

Insolvency laws were prevalent in India even during the colonial period. They were governed by "Presidency Towns Insolvency Acts, 1909" which was applicable in Calcutta, Bombay and Madras and the "Provincial Insolvency Act, 1920" which was applicable to the rest of India. However, this was only applicable to individuals and partnerships. The need for having insolvency laws for corporations was not felt as there weren't many corporations set up in the country at that time.

As time passed by, the number of corporations in India started to increase. Several legislations such as the "Companies Act, 1956", "Sick Industrial Companies (Special Provision) Act, 1985 (SICA)", the "Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act)","Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act, 2002"and the "Companies Act, 2013" were passed. However, the interplay of all these enactments led to lack of clarity and uncertainty in its application and over the authorities having jurisdiction in such matters. The alarming rate of Non-Performing Assets (NPAs) and bad loans in the recent past mandated the need for clarity and simplicity in insolvency legislation.

The large number of legislations had made recovery of debts and insolvency process a very tedious and time-consuming process. There was a need for a common regulation and a common authority to make the insolvency process easier and also to ensure that the creditors get their money back in a speedy manner. As a result, the IBC was introduced as a remedy for the existing problems.

OBJECTIVES OF IBC

With the enactment of the IBC, the lawmakers sought to achieve the following objectives-

- To maximize the value of assets
- To promote entrepreneurship

- To boost availability of credit and to balance the interests of all the stakeholders
- To replace the present legislations of insolvency which areinadequate, ineffective, unnecessarily complex and full of delays
- To improve the ranking of India in the "Ease of Doing Business" rankings published by the World Bank.[1]

INSOLVENCY PROCESS UNDER IBC

Before going into the understanding of the process of insolvency under IBC, it is important to read the definitions stated in the section 2 and 5 of this Code.

Who can initiate insolvency process

According to section 6 of IBC, "when a corporate debtor commits a default, a financial creditor, operational creditor or the corporate debtor itself, can initiate insolvency proceedings".

When insolvency is initiated by the creditors or corporate applicant

- Financial Creditor- Under section 7 of IBC it is defined that a financial creditor can file for Corporate Insolvency Process ("CIRP") to the adjudicating authority. A financial creditor can also file CIRP on behalf of other financial creditors too. But for this, the applicant has to furnish proper evidence to prove thedefault by the corporate debtor. They also need to propose a Resolution Professional. Within 14 days of the application, the adjudicating authority needs to communicate whether itis satisfied with the evidence and the proposed Resolution Professional.

- Operational Creditor- Under section 8 of IBC, an operational creditor must send a notice of demand to the corporate debtor along with the invoice, for the payment of the amount in default. The corporate debtor has two options – Either it should repay the amount or state the creditor existence of a dispute. This needs to be done within ten days of receiving demand notice. If after 10 days, there is no reply from the operational creditor regarding the repayment or existence of dispute, then under section 9 of IBC, theoperational creditor can approach the adjudicating authority to initiate CIRP, which should be accompanied with proper evidence. The operational creditormay suggest an "Interim ResolutionProfessional (IRP)". The adjudicating authority within 14 days shall, by an order accept or reject such application.

- Corporate Applicant- Under section 10 of IBC, a corporate applicant can initiate insolvency proceedings, for which it has to fill a form and along with that it has to furnish its book of accounts and required documents to the adjudicating authority. It also can suggest an interim resolution professional.

Time limit for CIRP

[1]MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE (2018)

Under section 12 of IBC, it has been stated that "the insolvency process shall be initiated and must be completed within of 180 days i.e. from the date of admission of the application". If needed, the creditors committee by a vote of 66%[2] and more can pass a resolution for the extension of insolvency process. The resolution professional, can apply for the extension to the adjudicating authority, which can, by order, extend the time period as it thinks is fit, but it cannot be more than 90 days. Also, this extension can be granted only once.

Appointment of Interim Resolution Professional("IRP")

Under section 16 of IBC, the interim resolution professional is appointed by the adjudicating authority.

The resolution professional isappointed as per the suggestion of the financial creditors or the corporate debtor. But it should be ensured that there should be no history or pending disciplinary proceedings against the suggested resolution professional.

If the resolution for insolvency is initiated by the operator creditor and if there is no proposal, then the adjudicating authority will ask the board for suggestion of interim professional.If the Resolution Professional is suggested, then the resolution professional is appointed as per the suggestion of operational creditors and there should be no disciplinary proceedings against the suggested resolution professional.

The tenure of the interim resolution professional should not be more than 30 days from date of appointment.

Duties and Management by Interim Resolution Professional

Section 17 and section 18 of IBC state the duties and roles of the interim resolution professional. The powers defined under the IRP are vast but to summarize, it is the main power of the board of directors that are transferred to the IRP.

Section 20 of IBC states that when IRP is in charge of the property of the corporate debtor, he or she must take utmost care while entering into transaction so as to maintain and preserve the value of the property.

Section 19 of IBC states that the personnel, promoters and any person related to the corporate debtor shall extend help to IRP and will always co-operate with the needs and requirements of IRP. If they do not assist then the IRP will report to the adjudicating authority for further directions.

Committee of Creditors

As defined in section 21 of IBC, a committee of creditors is constituted after collection of claims and determination of the financial position of the corporate debtor. The committee comprises of the financial creditors and not operational creditors. But, a related party cannot have the right of representing, participating or voting in a meeting of the committee of creditors. If there is more than one financial creditor, then the voting share of the financial

[2]THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, NO 6 OF 2018, THE GAZETTE OF INDIA (2018), PART II SECTION 1, http://egazette.nic.in/WriteReadData/2018/186195.pdf

creditor will be depending upon the financial debts owed to them. Every decision of the committee should be at least 66%[3] or more than that.

In absence of financial creditors, the committee shall be constituted with people who are capable to perform functions as specified by board.

Appointment of Resolution Professional

In section 22 of IBC it is stated that within first 7 days of constitution of the committee, the first meeting will take place. In this first meeting, by majority vote, the committee can either appoint IRP as their resolution professional or replace the IRP with new resolution professional. These decisions must be communicated to the adjudicating authority. The suggestion of the resolution professional is further transferred to the board for confirmation.

If the name of the proposed resolution professional is not confirmed by the board within 10 days of receiving the name, then it is assumed by the adjudicating authority that IRP shall continue his duties as the new resolution professional until the board confirms a new professional. This is executed by passing an order.

Duties of Resolution professional

Depending upon the decision taken under section 27 of IBC, the resolution professional shall carry on with the entire insolvency process as mentioned in section 23 of IBC. Under section 25 of IBC, it is stated that "it is the duty of the resolution professional to protect and preserve the assets of the corporate debtor and ensure its continuance". Its functions stated in this section are similar to that of IRP.

Functions of Committee of Creditors

Under the section 24 of IBC, it is mandatory for all the members of committee to meet each other physically or through any other electronic means. These meetings must be conducted by the resolution professional.

The notice regarding the meeting must be given to the financial creditors, partners of the corporate persons or members of the Board of Directors, operational creditors or their representatives, if the amount of their aggregate dues is not less than ten per cent of the debt.

Under section 27 of IBC, the committee of creditors are granted powers to replace the resolution professional. For replacement, a resolution needs to be passed by the committee which is at least 66%[4].Also, it is important that the new proposed Resolution Professional gives a written consent.[5]This application is submitted to the adjudicating authority. The further procedure is same as stated in section 16.

Under section 28 of IBC, there are certain actions defined for the resolution professional which require prior permission of the committee of creditors. For e.g.- raising of interim finance, change in capital structure, etc. Further functions are defined in this section. For any

[3]*Id.*
[4]*Id.*
[5]THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, NO 6 OF 2018, THE GAZETTE OF INDIA (2018), PART II SECTION 27, http://egazette.nic.in/WriteReadData/2018/186195.pdf

action a vote is taken by the committee in which it is mandatory for the vote to be more than 66%.

Resolution Plan

Under section 29 of IBC, the resolution professional has to prepare an information memorandum, as per board's specification. It is mandatory that the resolution professional has to provide access to the information (in physical or electronic form), to the resolution applicant.

Section 30 of IBC states that as per the information received by the resolution applicant according to the information memorandum, the applicant then may submit a resolution plan. This resolution plan must be properly scrutinized by the resolution professional to ensure that each resolution plan has the prerequisites as stated in Section 30(2). Then, the resolution plans are presented to the committee of creditors by the resolution professional, where a vote is taken in which the minimum vote share should be 66%[6]. This resolution plan is then sent to the Competition Commission of India for further approval.[7]The approved resolution plan is submitted to the adjudicating authority by the resolution professional.

Section 31 of IBC states that, if the adjudicating authority approves the resolution plan as given by the resolution professional, then it shall by order, approve the resolution plan which becomes binding on everyone in the company of corporate debtor. It may even by order reject a proposed resolution.

If there are any appeals regarding the approval of resolution plan, then the procedure is stated under section 61 of IBC.

Liquidation Process

Under section 33 of IBC, provision for liquidation is stated. The adjudicating authority may initiate liquidation proceedings if, within the specified time period a resolution plan is not submitted or if the prerequisites for the resolution plan are not met. Also, if the resolution professional, during the insolvency process, but before the confirmation of resolution plan, informs to adjudicating authority that the committee of creditors wishes to liquidate the corporate debtor, then the authority can pass an order of liquidation.

Liquidator

Under section 34 of IBC, when an order of liquidation is passed by an adjudicating authority, the resolution professional shall act as a liquidator for the process of liquidation. But the adjudicating authority may choose not to continue the Resolution Professional, if the requirements stated under section 30 of IBC are not met or the board wants to replace the resolution professional. Also, the newly appointed liquidator needs to convey his or her

[6]*Id.*

[7] Rajat Arora,Dheeraj Tiwari, *CCI nod must before lenders finalise resolution plan* ,THE ECONOMIC TIMES, July 202018, https://economictimes.indiatimes.com/news/economy/policy/cci-nod-must-before-lenders-finalise-resolution-plan/articleshow/65062501.cms

consent in writing.[8] Under section 35 of the IBC, the powers and duties of the liquidator are specified. Its powers are quite similar to that of resolution professional but it has certain additional powers. Section 36 of IBC states that the liquidator shall form a group of assets and name it as the liquidation estate. The assets which are to be included or not to be included are stated in sub section 3 and 4 of this section.

Under section 37 of IBC, the liquidator has been given powers to access any information system for admitting proof of claims. Also, the creditors shall be furnished with information as required, by the liquidator.

Section 38 of IBC states that within 30 days of commencement of the liquidation process, the liquidator shall collect the claims of the creditors. The financial or operational creditor can submit their claims to the liquidator along with evidence. The creditors can withdraw their claim within 14 days of its submission.

In section 39 of IBC, it is stated that the liquidator needs to verify the claims of the creditors before admitting it. Under section 40 of IBC, the liquidator can reject the claim in part or full. If any creditor is aggrieved with the valuation of claims under section 41 of IBC, then the creditor can appeal to the adjudicating authority under section 42 of IBC.

Preferential Transactions

Section 43 of IBC states that the liquidator has the duty to locate certain transactions which are in favor of certain creditor, so that corporate debtor can apply for avoidance of preferential transactions. A transaction shall be considered to be preferential if it is in interest of creditor for a guarantor or a surety or a transaction and may put a certain creditor in an advantageous position and will also affect the distribution of assets under section 53 of IBC. Also, a preference shall be given relevant time if the transaction was with a related party and preceded two years prior to the insolvency proceedings and one year if given to a person if preference given to another person. The adjudicating authority, under section 44 of IBC, by an order directs the advantageous creditor to do things stated in the sub clause 1 of this section. It is also cleared under this section that a person is considered to have clear information regarding the insolvency process when the public announcement is made as specified under the Section 13 of IBC.

Undervalued Transactions

Under section 45 of IBC, it is stated that certain transactions which were undervalued must be immediately acted upon by the liquidator. A transaction is considered to be undervalued when a corporate debtor gives a gift to a person or when corporate debtor enters into a transaction which involves transactions of one or more assets. Also, these transactions must not be taking place in ordinary course of business. This section aims to prevent the corporate management from hiding the assets of the corporate debtor, who have the knowledge of the poor financial condition of the company. The relevant period for avoiding the undervalued financial transactions of the company is 1 year for transactions entered into with any person

[8]THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, NO 6 OF 2018, THE GAZETTE OF INDIA (2018), PART II SECTION 34, http://egazette.nic.in/WriteReadData/2018/186195.pdf

whereas it is 2 years for transactions with related party, as define in section 46 of IBC. For the proving of undervalued transaction, adjudicating authority may require proper evidence.

If undervalued transaction took place and the liquidator has not brought it to the notice of the adjudicating authority then under section 47 of IBC, a creditor can apply to the adjudicating authority for making such transactions void. If the adjudicating authority is satisfied that such transaction has taken place, then by order it will restore the position of such transaction and also direct the board to initiate proceedings against the liquidator.

Certain orders that can be passed by the adjudicating authority against the undervalued transaction are stated under section 48 of IBC.

Under section 49 of IBC, it is stated that if the adjudicating authority is satisfied that corporate debtor entered into undervalued transactions deliberately, then by order, adjudicating authority will restore the position as it existed before such transaction.

Extortionate Credit Transaction

Under section 50 of IBC it is stated that, if the corporate debtor had been a party to an extortionate credit transaction, which has occurred within 2 years, preceding the insolvency proceedings then resolution professional or liquidator can make an application for avoidance to the Adjudicating authority.

Under section 51 of IBC, gives the power to the adjudicating authority to restore such transaction if the authority is satisfied that the authority had to pay exorbitant payments. Further orders that can be passed are stated in this section.

Secured Creditors

Under section 52 of IBC a secured creditor can do the following things in the liquidation proceedings -

- It can relinquish its security interest and receive proceedings from the sale of assets.
- When the creditor realises the security interest, he shall inform about this to the liquidator and also identify the asset subject to be realised.
- The liquidator shall verify such realisation of security.
- If any of the creditor faces any resistance from the corporate debtor at any time during such process, the creditor shall apply to the adjudicating authority.
- When the above application is received by the adjudicating authority, it may pass an order directing the corporate debtor to fulfil the task.
- If any surplus received from such transaction, the secured creditor should inform it to the liquidator.
- The insolvency resolution costs shall be deducted from the amount received from the realisation.
- If the secured assets are not sufficient to repay debts, then the secured creditor must be paid by the liquidator according to the section 53 (1).

Distribution of Asset

Under section 53 of IBC, the proceeds from the sale of acquisition shall be distributed in the manner specified in this section.

Dissolution of Corporate Debtor

Under section 54 of IBC, when the assets have been completely liquidated, then liquidator shall make application to the adjudication authority for liquidation of corporate debtor.

COMPARATIVE ANALYSIS OF THE WINDING UP OF COMPANY UNDER THE COMPANIES ACT OF 2013 AND IBC

Here is the analysis about how IBC is different from the "Companies Act, 2013"-

Modes of Winding Up

In "Companies Act, 2013", under section 270, there are 2 ways in which the companies could wind up- 1) Tribunal 2) Voluntary.

Under IBC, there is no term as winding up. The companies first go under CIRP and later liquidation. This process can be initiated in 2 ways -1) By application to the Tribunal by the creditors 2) Voluntary liquidation by companies.

The concept of winding up has not been incorporated under the IBC because if a defaulting company or corporate debtor applies for the voluntary winding up under the Companies Act, then it can possibly take advantage of non-interference by the committee creditors. The corporate debtor can easily pass a resolution for winding up and file such application even if its assets are more than its liabilities i.e. even though it is capable to pay off its debts. This puts the creditors at a disadvantage. But IBC ensures that through the appointment of the IRP and Resolution professional, the corporate debtors are properly scrutinized so that they cannot defraud the creditors, which was possible in the "Companies Act, 2013".[9]

Circumstances under which winding up or insolvency takes place

In "Companies Act, 2013", under section 271 there are certain specific grounds which have been stated. For e.g. – Unable to pay debts, special resolution by company, company entering into fraudulent transaction, tribunal is of the opinion that company should wind up, etc.

But under the IBC, the unnecessary grounds have been removed. The only ground for initiating CIRP is non-repayment of the dues to the creditor, which have been stated in the section 6, 7 and 8 of IBC.

Grounds under which voluntary winding up or liquidation can take place

Under section 304 of "Companies Act, 2013" a company can voluntary wind up its company if it has passed the period of its decided duration, for which it has to pass a resolution. Also, if a company passes a special resolution the company could wind up voluntarily.

[9]Anirudh Gotety, *Winding-up under Section 271(a) of the Companies Act and Its Impact on the Insolvency and Bankruptcy Code*, INDIACORPLAW (August 18, 2017), https://indiacorplaw.in/2017/08/winding-companies-act-impact-insolvency-bankruptcy-code.html.

Under the IBC, a company cannot easily undergo voluntary liquidation process. Under section 59 of IBC, it is a prerequisite that a corporate person must not have committed any default.This should be accompanied with proper documents and the special resolution of the members of the company.

Person appointed for liquidation or winding up process

In the "Companies Act, 2013", the tribunal has been given the powers under the section 275 to appoint a liquidator for the purpose of winding up of the company. The liquidator has to collect information upon the nature and details of the assets, liabilities etc. which needs to be submitted as a report within sixty days of the passing of the order.

But under the IBC, the creditors have been given the option to suggest an IRP, which the adjudicating authority accepts only if there are no disciplinary proceedings against the suggested IRP. There are chances that the person appointed as IRP initially, may also be the liquidator. It depends upon the discretion of the committee of creditors.

Time limit for completion of the winding up or liquidation of the company

Under the "Companies Act, 2013", the tribunal allots a time period within which the winding up process should be completed but depending upon the report submitted by the liquidator.

The resolution professional which is appointed under section 12 of IBC shall complete the CIRP within a period of 180 days of admission of the application of to initiate such process. Also, the CIRP process can be extended by 90 days by filing an application to the adjudicating authority. Such application can be made only once.

Initiation of liquidation process

Under the Companies Act there is no provision stating about the non-compliance with the time limit set by the tribunal for winding up process.

But under the IBC, it has been clearly stated under section 33(1) of IBC that if before the completion of CIRP or after the completion of the maximum period, the resolution plan is not received from the as per sub section 6 of section 30 of IBC or if the submitted resolution plan is not as per the section 31, then the adjudicating authority will order for liquidation.

Order of priority of distribution

In the "Companies Act, 2013", the tribunal had been given the powers to decide upon the priority on how and who should be paid first, according to what it feels fair and just, as defined under the section 298 of "Companies Act, 2013".

But under IBC, section 53 has properly codified about the order of preference in which the proceeds will be distributed. Also, the unsecured financial creditors have been given a greater primacy than debts owed to government, and other unsecured creditors.[10]

[10]Uday Khare, *Liquidation under the IBC – Order of priority signals shift in economic rationale,* myLaw (13th March 2018), http://blog.mylaw.net/liquidation-ibc-order-priority-signals-shift-economic-rationale/.

Role of Tribunal

In the "Companies Act, 2013", it is seen that the tribunal is actively involved in the process of the winding up of the company. For e.g. -deciding upon the winding up of company, appointment of the liquidator, deciding upon the time limit for the winding up process, etc.

Unlike the Companies Act, most of the functions of tribunalunder IBC have been delegated to the creditors, IRP, liquidators. Also, several functions which the tribunal earlier used to perform on their own discretion, such as time limit for winding up, etc. have been codified properly and explained elaborately.

Raising of objections

Under the "Companies Act, 2013" a company can file its objections in relation to the winding up, only after the order for liquidation has been passed by the tribunal. Also, the objection has to be filed to the tribunal for which the time period provided is thirty days from the day of passing the order, as stated in the section 274(1) of "Companies Act, 2013".
Whereas, under the section 8 of IBC, which states about the insolvency resolution by the operational creditor, the corporate debtor is given ten days' time, within which it can send the notice of dispute, but to the operational creditor.

Removal of liquidators

Under section 276 of the "Companies Act, 2013", the tribunal had been given the powers to remove or replace the previously appointed liquidator on the grounds stated under this section. For e.g. - misconduct, fraud, etc.

Under the IBC, under section 27 and section 33, the power has been granted to the committee of creditors to decide upon the removal or replacement of the Resolution professional or Liquidator. The tribunal, i.e. the adjudicating authority, is only notified about the decision.

Autonomy of the Liquidator

In "Companies Act, 2013", under section 277, after the winding up order is passed by the Tribunal and liquidator is appointed, then within three weeks of the passing of the order, the Liquidator has to apply to the Tribunal for the constitution of the winding up committee which shall assist in the winding up process of the company.

Under section 17 and section 19 for IRP and under section 25 for their solution professional, autonomy has been given to appoint or replace the persons required to initiate the insolvency proceedings.

Submission of report

In the "Companies Act, 2013", the appointed company liquidator has to perform the function of collecting all the information regarding the assets and liabilities of the company and then

submit it to the tribunal within 60 days of the passing of the order by the tribunal, which has been specified in the section 281 of this act.

Under IBC, it is the Resolution Professional who collects the claims and also analyses the assets of the company debtor, which then is presented in the form of information memorandum to the committee of creditors. According to the information memorandum, financial creditors can submit their resolution plan, which then is scrutinized by the Resolution professional to ensure that the prerequisites are met by the resolution applicant as specified in the code. Also, the plan must be submitted within 180 days of the initiation of CIRP.

Avoidance transactions

Preferential transactions, as mentioned above found no place in the "Companies Act, 2013", which caused much trouble to creditors who were at an equal footing but were not treated so by the corporate applicant/ corporate debtor. This led to situations where the corporate debtor could enter into arrangements with one of the creditor and avail a favorable deal in terms of repayment or discharge. Similarly, in Undervalued transactions, companies often undertook transactions with related entities where the value of the asset/transaction was far below the fair market value of the asset, thereby depriving the company of the true profits they are entitled to and eventually depriving the creditors of their fair share of repayment.

So, in IBC sections 43- 48, the liquidator or the resolution professional has been given the task to locate such transactions to ensure that the creditors get their fair share. Also, if the liquidator or resolution professional is unable to trace such transaction but the creditor finds out, then the creditor is also given the opportunity to bring it to the notice of the adjudicating authority.

TRANSFER OF PENDING PROCEEDINGS

The Ministry of Corporate Affairs on 7th December, 2016 through a circular notified about the "Companies (Transfer of Pending Proceedings) Rules, 2016 (Transfer Rules)".[11]It states about the transfer of certain proceedings from the High court to the National Company Law Tribunal (based on certain criterion). But, since the notification had been passed regarding the transfer rules, there were doubts raised regarding the ability of the NCLT to initiate CIRP even though there are existing winding up petitions in the court.

This doubt was cleared in the case in Bombay High Court[12]. In this case, the corporate debtor filed for insolvency proceedings under the provisions of IBC, even though there was an existing winding up proceedings was going on in the High Court. So, in the Bombay High Court, the following two issues were being addressed-i)"whether an application under the IBC can be made even in cases where a winding up petition has been admitted and is pending before a Company Court"; and (ii) "whether such an admission of a winding petition allows the Company Court to injunct proceedings before the NCLT". The court placed reliance in a

[11]SiddharthRatho and Vyapak Desai, *Insolvency and Bankruptcy Hotline*, Nishit Desai Associates (15th February 2018), http://www.nishithdesai.com/information/news-storage/news-details/newsid/4485/html/1.html.
[12]M/s. Jotun India Pvt.Ltd.v. M/s. Aluplex India Pvt. Ltd. (2015) SCC OnLineBom 2380 (India).

Supreme Court judgement[13],where it was observed that when SICA (Sick Industrial Companies Act) was enacted, it was held to have primacy over the then Companies Act, 1956. Similarly, as IBC is enacted it leads to the repealing of the SICA. So, IBC provisions will prevail over the SICA laws. The court also stated that in none of the provisions of the Companies Act it is expressly or impliedly stated that if there is a pending petition for winding up under section 252 of "Companies Act, 2013" against the same company, then petition for initiating insolvency proceedings cannot be initiated under the IBC provisions in NCLT. The court also went into the legislative intent of enacting the code. It stated that the lawmakers were aware of the many petitions for winding up must be pending under the "Companies Act, 2013". If the lawmakers wanted to give exemptions to the pending petitions regarding the primacy of IBC over "Companies Act, 2013", it would have explicitly stated about it, but it hasn't.

Thus, this ruling gives primacy of IBC provisions over the provisions of the "Companies Act, 2013" if any creditor or the corporate debtor itself applies for insolvency proceedings under the IBC to the NCLT. So, a company can file application under IBC even in cases where a winding up petition has been admitted and is pending before a Company Court.

CONCLUSION

In my opinion, the IBC is one of the most efficient insolvency legislation which has been implemented inour country. This is because of the current rise in the number of defaults made by big businessmen by taking away the hard-earned money of the Indian people. The IBC has replaced laws which have become obsolete. The IBC has included all the best parts from the laws which have been repealed, and the functions of the Tribunal have been delegated to the IRP and Resolution Professional which has made the process of insolvency faster and efficient. The role of the tribunal has been restricted to admitting applications and entertaining appeals. Under the IBC, the power of decision making has been given to the committee of creditors unlike the Companies Act where the tribunal used to pass orders on behalf of the creditors. This shows that the creditors are given the chance to make their own decisions instead of having it done on their behalf. Under the IBC, there has been a specified time limit within which the CIRP or the insolvency proceedings have to take place, which is much better than the winding up procedure stated under the "Companies Act,2013", in which the tribunal used to decide at its own discretion, based on the report submitted by the liquidator. The IBC not only provides for the punishment to be faced by the corporate debtor, it also states about the repercussion that the resolution professional or the liquidator would face if he or she does not carry out his or her duty properly. IBC also provides guidelines regarding what transaction should be considered as preferential or undervalued and within what relevant time period. To state about successful cases under the IBC, recently Tata Steel had completed its takeover of Bhushan Steel, which has one of the largest defaulting party in India. The resolution showed that the lenders could recover round 76% of its outstanding debt.[14]

Also, it is very early to say that it is a promising move. There are few problems that will be faced after the implementation of IBC. One of the biggest challenges is the transferring or

[13]Madura Coats Limited v. Modi Rubber Ltd. (2016) SCC OnLine SC 626 (India).
[14]*Default resolved: Acquisition of Bhushan Steel under IBC is a milestone in bankruptcy proceedings*, TIMES OF INDIA, May 22 2018,https://blogs.timesofindia.indiatimes.com/toi-editorials/default-resolved-acquisition-of-bhushan-steel-under-ibc-is-a-milestone-in-bankruptcy-proceedings/.

transition of cases under the Companies Act to the IBC. Up to March 2015, there were 4,200 cases which were pending in the Company Law Board. If these many cases are transferred to the IBC, the IBBI will be burdened with many cases in a short time, thus, defeating the main purpose of implementing IBC.[15] Also, the provisions regarding the maximum time limit is an attractive feature in this code. It is important that the time limit specified in the IBC is adhered to by the Resolution Professional. If this is compromised then the main purpose of the enactment of the code is defeated.[16] For e.g.- In NCLT Mumbai, the bench had reserved the bankruptcy process of Jyoti Structures Ltd as DBS, a financial creditor, sought for rejection of resolution plan which brought the insolvency process to a standstill[17].The IBC is also somewhat seeming to be biased towards the financial creditors of the company. For e.g.- For initiating the CIRP process, the financial creditor only has to prove that the default has been made, whereas the operational creditor has to send a demand notice, to which if there is no reply, then CIRP can be initiated. Also, while constituting committee of creditors, no operational creditor is allowed to be the part of the committee. The IBC has not defined clearly about what will be the effect on the ongoing CIRP or insolvency proceedings if there are any appeals, whether the CIRP or liquidation will come to halt or it shall continue till the order is passed by the tribunal. The important thing to notice here is that RBI had taken responsibilities to finish with the insolvency process of the 12 large default cases in a year out of which only 2 cases have been resolved i.e. the Bhushan steel case and Electro steel case, which shows that the insolvency process has not been that effective.[18]

The IBC is a game changing insolvency law that has given hope and increased the confidence of the creditors regarding the repayment of their debt if there is a case of default on the part of the corporate debtor. Implementation of the IBC will also improve the ranking of India in the "Ease of Doing Business" rankings published by the World Bank, thus encouraging trade andbusiness.

[15]RajeswariSengupta and Anjali Sharma, *Challenges in the Transition to the New Insolvency and Bankruptcy Code*, (15th December, 2016), https://thewire.in/law/insolvency-and-bankruptcy-code.
[16]*Id.*
[17]Shailaja Sharma,*Alok Industries' lenders approve resolution plan by RIL, JM Financial ARC,*(22nd June,2018),https://www.vccircle.com/alok-industries-lenders-approve-resolution-plan-by-ril-jm-financial-arc/.
[18]Indo Asian News Service, Kolkata, *Electrosteel case first resolution under IBC as NCLT approves Vedanta bid*,HINDUSTAN TIMES, April 17,2018,https://www.hindustantimes.com/business-news/electrosteel-case-first-resolution-under-ibc-as-nclt-approves-vedanta-bid/story-XkEGpclwxj1IOUAn3uNbjN.html.

UNIQUENESS OF CLASS ACTION SUITS IN INDIA: REASONS FROM THE INDIAN PERSPECTIVE

~PRASAD HEGDE &OJASWA PATHAK*

ABSTRACT

It has been approximately two years since Section 245 was notified by the MCA and we have hardly heard any buzz about a class action suit filed in the tribunal. Class Action suits are a very important tool of commercial litigation which has hardly been used in India since the provision was made effective. This paper is going to discuss the genesis of class action suits with primary focus on the Satyam scandal as the reason for the MCA to incorporate a specific provision for class action suits. Further, the author shall be discuss and analyse the Section 245 in its entirety. The paper shall also be discussing the difference between class action suits and other tools of commercial litigation with respect to the remedies different tools of commercial litigation offers to the plaintiff's. A comparative analysis of section 245 with other commonwealth jurisdiction such as the UK and the USA would help us find out the merits and demerits in our system hence this paper would analyse the scheme of class action suits in the United Kingdom and the USA. By drawing an analogy the author shall highlight certain hindrances and drawbacks in the present scheme of class action suits in India which is not allowing for effective implementation of this section. The paper will conclude by giving certain recommendation for the better implementation of the section which would indeed allow for a robust mechanism of class action suits by giving much more flexibility to shareholder or depositors to initiate class action suits.

INTRODUCTION

The cardinal principle of the Rule of law is to protect the "little guy" from the tyranny and oppressive nature of the Mighty.[1] Adopting it in the corporate context it essentially means to provide suitable mechanisms for minority shareholders to prevent them from being at the mercy of the majority shareholders.[2] There are two approaches for the propriety of enforcement i.e., Public enforcement which means state initiated enforcement & Regulatory mechanisms[3] and private mechanisms which means minority/victim centred legal action.[4]Private enforcement vide shareholder's actions can be either direct actions for breach of duties and obligations owed to shareholder directly in which case the remedies flow to the shareholders,[5] or they can be derivative actions where shareholders bring them on behalf of the company for breach of duties owed to the company, where remedies flow to the

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[1] Richard K. Greenstein, *Why the Rule of Law?* 66 Louisiana Law Review 54, 72 (2006).

[2] Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer and Robert W Vishny, *Investor Protection and Corporate Governance* 58 Journal of Financial Economics 27, 35 (2000).

[3] William Landes and Richard A. Posner, *the Private Enforcement of Law*, 4 Journal of Legal studies 32, 40 (1975).

[4] A. Mitchell Polinsky, *Private versus Public Enforcement of Fines*, 9 Journal of Legal studies 109, 111 (1980).

[5] A. Mitchell Polinsky and Steven M. Shavell, *The Economic Theory of Public Enforcement of Law*, 38 Journal lfor Economic Litreature 62, 85 (2000).

company.[6] The analysis of corporate laws evidently shows two major problems i.e., Agency problem and collective action problem. Agency problem arises due to the separation in ownership and control and the collective action problem arises due to the incapability of minority shareholders to actively participate in the decision making process of the company.[7] Hence, to minimise such problems and for effective enforcement of the rights of minority shareholders there are various mechanisms such as Derivative actions, class action suits etc…[8] Derivative actions have been used since a long time but the concept of class action suits is a recent phenomenon in the Indian legal framework which shall be the sole of focus of the paper and shall be dealt in detail.[9]

The Companies Act, 2013 [Hereinafter 2013 Act] when introduced bought quite a few procedural and substantive changes when compared to the previous Companies Act i.e., Companies Act, 1956 [Hereinafter 1956 Act] but altogether introducing new substantive rights was a rarity. However, there were rare changes whereby the right of a collection of shareholders or depositors to raise and maintain a suit as a class of claimants was one of them which was absent in the 1956 version.
Class action suits have been an important component of commercial litigation over all parts of the world but sadly hasn't been a part of the Indian commercial legal framework till 2015 (Section 245 was notified by the MCA and was made effective from 1st June, 2016). Class action suits as it goes by the name means when the depositors or shareholders of a company file a suit with the National Company Law tribunal alleging that the management or the affairs of a company (Other than a Banking Company) is being conducted in a manner prejudicial to the interests of the Members, Shareholders or the depositors.[10] Such class action suits can be filed against the Company, its directors, experts, consultants or even audit firms.[11] Although some countries disregard it as a mechanism to extort monies from the company but other jurisdictions encourage it as a mechanism to enforce greater accountability and responsibility.[12] The tribunal while considering the application, whether the member sand depositors are filing the suit with a bonafide reason. It will also consider the viability of the cause of action to be considered individually rather than a class action suit. It shall also consider the role of other people not involved in the suit and will also consider the opinion of neutral parties to the class action suit.

Class Action suits are more valuable in certain ownership and institutional structures where there are diverse and dispersed shareholders and its value increases when there are concerns of collective actions. The current situation in India is tilting towards a situation where there are diverse group of shareholders and a weal institutional structure which has enabled a perfect entry for class action suits in the legal framework. However, its usage has been somewhat on the lower side. Therefore, this paper will be analysing *firstly,* the genesis of class action suits *secondly*, characteristics of class action suits, the eligibility criteria, the

[6]UmakanthVarottil, *Companies Bill, 2011: Class Actions*, INDIACORPLAW (September 11, 2018, 9:34 AM), http://indiacorplaw.blogspot.in/2011/12/companies-bill-2011-class-actions.html (December 18, 2011).
[7] Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, 3 COLUMBIA. L. REV. 828, 834 (2007).
[8]DAN W PUCHNIAK& HARALD BAUM, THE DERIVATIVE ACTION: AN ECONOMIC, HISTORICAL AND PRACTICE ORIENTED APPROACH 56 (Cambridge 2012).
[9]UmakanthVarotill, *The Advent of Shareholder's Activism in India*, 1 Journal of Governance 599, 610 (2012).
[10]*P RAMANATHAIYER, ADVANCED LAW LEXICON 820 (Lexis Nexis 5th Ed. 2017).*
[11] Black, Bernard and ReinierKraakman, '*A Self-Enforcing Model of Corporate Law'*, 109 HARVARD L. Rev.1911, 1928 (1996).
[12] Romana and Roberta, *'The Shareholder Suit: Litigation without Foundation?',* 7 Journal of Law, Economics, and Organization 55, 64 (1991).

reliefs which can be claimed *thirdly,* the difference between class action suits, derivative suits, representative suits and suits of oppression and mismanagement *fourthly,* the rarity of class action suits in India *lastly,* conclusions and recommendations.

BIRTH OF CLASS ACTION SUITS

The general doctrine which is ubiquitous in corporate law is the "Proper plaintiff rule" or the "Foss v Harbottle" rule.[13] It elucidates that for the alleged wrong committed against the company, the company is the only proper plaintiff to initiate action against the wrongdoer[14] and any action initiated by the minority is fruitless if the majority can ratify it.[15] Hence, the English court had evolved a new tool of commercial litigation called as a derivative action suits which can be used in cases of Ultra vires transaction[16] and Fraud on minority.[17] The class action suit was an 'Invention of Equity'[18] arising out of the Bill of Peace of the United Kingdom which allowed English courts to bring together multiple claims related to the same cause of action within a common legal proceeding.[19] The reason why this kind of an action is useful is because it helps to reduce the cost, time and energy as the grievances of a lot of people are clubbed in a singly suit.

The concept of the class action suit emerged in United States of America in the early 18th century. This course of litigation grew in popularity with an increasing number of claimants seeking restitution and often retribution under Rule 23 of the United States Federal Rules of the Civil Procedure for sundry claims ranging from corporate fraud to air flights delay. The amendment in the year 1966 brought about a change in the way class action practice and litigation was perceived and this invited much required scholarly attention.

In the case of India, the concept of class action suits was first endorsed by the JJ Irani Report in 2005.[20] The report suggested that in case of fraud on the minority by the wrongdoers, who are in control and prevent the company itself bringing an action in its own name, derivative actions in respect of such wrong have been allowed by courts. Such, actions are brought by a group of shareholders/ members against the company in the form of a collective suit rather than an individual suit. Similarly the principle of "Class/Representative Action" by one shareholder on behalf of one or more of the shareholders of the same kind have been allowed by courts on the grounds of persons having same *locus standi*. Though these principles have been upheld by courts on many occasions, these are yet to be reflected in Law. The report stressed upon the need for recognition of these principles.

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[13] VIKRAMADITYA KHANNA &UMAKANTHVAROTTIL, THE RARITY OF DERIVATIVE ACTIONS IN INDIA: REASONS & CONSEQUENCES, THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 369 (Cambridge University Press 2012).

[14] Foss v Harbottle, (1843) 2 Hare 461.

[15] MARGRET CHEW, MINORITY SHAREHOLDER RIGHTS AND REMEDY 99 (Lexis Nexis 3rd Ed. 2007).

[16] Prudential Assurance Co. Ltd. v. Newman Industries Ltd., [1982] Ch. 204 (CA).

[17] Spectrum Technologies USA Inc. v. Spectrum Power Generation Company Ltd., 2000 (56) DRJ 405.

[18] William Weiner, Delphine Szyndrowski, *The Class Action, From The English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread*, 8 Whittier Law Review 936, 943 (2009).

[19] Chafee, Zechariah, *"Bills of peace with multiple parties."* 4 HARVARD L. Rev.1333, 1367 (2013).

[20] Ministry of Corporate Affairs, *Expert Committee on Company Law Report on Company Law*, May 31, 2005, http://resource.cdn.icai.org/8315announ854.pdf (last visited on May 4, 2018).

India has accepted the rule laid down in "Foss v. Harbottle" and also recognised the exception recognised by the English courts[21] but it had not given legal effect to class action suits and later on the main purpose of having them in the Companies Act, 2013 as a specific provision was to give greater protection to minority shareholders, affix greater accountability and prevent corporate frauds and scams.

The most important reason for having a specific provision for class action suits was the "Satyam Debacle". Satyam Computer Services limited was a leading IT company which used to provide IT and Communication services. It has now been merged with Tech Mahindra. It was a Public as well as a listed company on the BSE, NSE and the NASDAQ. In December, 2008 a board meeting of Satyam was called and the proposal to acquire Maytas Property and Maytas Infra Limited was placed before the board. As it was an RPT it required majority support and ultimately the resolution was passed unanimously.[22] The shareholders instantly disagreed with the decision of the board and the share prices took an all time low.[23] In the meanwhile, on 7th January, 2009 Mr. Raju confessed to Financial Mismanagement and the Maytas acquisition was just a mechanism to cover up the mismanagement. The moment the acquisition deal failed he was exposed because for the past few year Satyam was showing exponential profits in the name of fictitious assets which never existed in reality. The share price of Satyam fell from Rs 304.80 on the 31st of November 2008 to Rs 54.05 on the 31st of January 2009 resulting in a major loss to shareholders wealth.[24]

The promoters and the members of the board were prosecuted under the SEBI Act, 1992 and also under the SEBI (Prevention of Insider Trading) Regulations. But the most important thing here was the remedy which had to be given to the shareholders was not possible because there was no specific legal provision for compensating them for their loss in share value. The aggrieved approached the National Consumer Dispute Redressal Commission [Hereinafter NCDRC] and the Supreme Court of India but to no avail. The NCDRC rejected the petition on two grounds i.e., the lacked the necessary infrastructure as the CLB is already looking into the matter and the absence of a specific legal provision which could give them their loss of shareholding value. Even an appeal to SC could not be of any use as the SC refused to interfere with the decision of the NCDRC.[25]

At the same time in the USA holders of American Depository Receipts (ADRs) listed on the NASDAQ were able to claim $125 million from the company by way of a "class action suit".

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[21]**PPN Power Generating Company Limited v. PPN (Mauritius) Company (2004) 129 Comp. Cas. 849**, in this case its original application was in the form of an application to the Company Law Board as a Derivative Action in order to allow Minority shareholders to file for Arbitration Proceedings against the Tamil Nadu Electricity Board under a contract which the Company did not resort to. The madras HC held that Minority shareholder can file for Arbitration on behalf of the Company and the Company Law Board and the Ld. Single Judge are correct in denying the antisuit injunction asked by the Company**; NiradAmilal Mehta v. Genelec Limited (2008) 146 Comp. Cas. 481 (Bom)**, the question is to allowing an injunction on further disposal of the sale of the company's property by a Third Party as it was made without confirming to the essentials of a valid shareholder's approval and the court held that the plaintiff is entitled to an injunction from the defendant**; MacDougall v. Gardiner (1875) 1 Ch. D. 13.**

[22]Varottil, Umakanth, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance* 6 Hastings Business Law Journal 276, 288 (2010).

[23] Ahmad, Tabrez and Tabrez, Malawat and Kochar, Yashovardhan and Roy Ayan, *Satyam Scam in the Contemporary Corporate World: A Case Study in Indian Perspective,* 2 IUP Journal 13, 19 (2010).

[24]TECH MAHINDRA, http://www.techmahindra.com/sites/resourceCenter/Financial%20Reports/mahindra-satyam-annual-report-2008-09- and-2009-10.pdf (last visited on August 4, 2018).

[25] Midas Touch Investors Association v. M/S Satyam Computer Services Ltd. &Ors, Civil Appeal No. 4786 of 2009, in the Supreme Court of India, 10/08/2009.

In the case of In re Satyam Computer Services Ltd. Securities Litigation a sum of $125 million was paid as settlement by Mahindra Satyam to United States investors who held ADRs as a result of the erstwhile promoters of the company admitting to a fraud. Tech Mahindra, which subsequently took over Satyam, was required to settle all pending litigations with several investors who had claimed losses due to the shares of the firm plunging on the stock exchanges.[26] The ADR holders also made PWC a party to the suit as they were the statutory auditors of the company and failed in their duty to detect such a huge financial mismanagement and corporate fraud. Additionally, the fact that Satyam represented a significant revenue stream for PWC India may have created incentives for PWC India's managers to give Satyam the accounting treatment it wanted to show huge profits.[27] There were fake customer identities, fake invoices which were created by the global head of the internal audit to inflate the revenue amount.[28] The fraud was also perpetrated by forging board resolutions and by obtaining loans using illegal means for the company; it went to an extent that the cash received from the American Depository Receipts were not even shown in the balance sheet.[29]

In spite of all these incidents, PWC was untouched by the shareholders in India due to a lack of a specific provision to prosecute them for their involvement in the fraud and financial mismanagement. Under the 1956 act the auditors were hired by the board of directors and had a privity with shareholders which also were a hindrance for the Indian shareholders to file a suit and recover the loss in the shareholding value. But that was not the case in the USA, because the holders of ADR made PWC a party to the class action suits and recovered almost 125 million from Satyam and 25.5 million from PWC by way of a class action suit. The disparity, with which Indian and American security holders of Satyam were dealt, renewed the interest of the Ministry of Corporate Affairs in class action suits although there was some support to the argument that a suit could have been accepted when it was files as a representative suit under Order 1 Rule 8 of the Code of Civil Procedure.[30]

ANALYSIS OF SECTION 245 OF COMPANIES ACT, 2013

This section is going to be divided into 3 parts and those are (i) Grounds on which a class action suit can be filed (ii) Rights of Shareholders in a Class Action suits (iii) Against whom a class action suit can be filed and the Eligibility criteria (iv) Possible reliefs and (v) the procedure and the penalty involved in a class action suit.

[26]ECONOMIC TIMES, http://economictimes.indiatimes.com/2012-08 29/news/33476332_1_mahindrasatyam-lead-plaintiffs-satyam-computer-services (Last visited on August 4, 2018).
[27] PG Thakurta, *Reading the Satyam Scam*, 44 ECONOMIC AND POLITICAL WEEKLY 608-611 (17th January, 2009).
[28]BLOOMBERG, http://www.bloomberg.com/news/2011-02-17/satyam-computer-services-pays-125-million-to-settleshareholder-lawsuit.html (Last Visited on August 5, 2018).
[29] Madan Lal Bhasin, *Corporate Accounting Fraud: A Case Study of Satyam Computers Limited,* 2 Open Journal of Accounting 32, 35 (2013).
[30]UmakanthVarotill, *A Cautionary Tale of Transplant on Indian Corporate Governance*, 21 (1) NLSIU L. REV. 42, 56 (2009).

Section 245 of the 2013 act enables a member, depositor or shareholder to initiate a proceeding against a company on similar line of section 241 i.e., Oppression and mismanagement suits. The Indian version of the class action suit is somewhat similar to a combination of Derivative suits and Representative suits (Order 1 Rule 8). The **grounds on which a class action suit can be filed** in the National Company Law Tribunal is:

a) the affairs of the company have been or are being conducted in manner which proves to be prejudicial to the public interest or to the interests of the company or oppressive to one or other shareholders; or
b) there has been a material change in the management or control of the company by an alteration in the Board of Directors, or manager, or in the ownership of the shares of the company, or in any other manner which by which the affairs of the company will be conducted in a manner prejudicial to its interests or shareholders or class of shareholders.[31]

Section 245 of the Companies Act, 2013 provides the following **rights to the members, depositors or shareholders in a class action suit:**

a) To restrain the company or its board of directors from passing a resolution suppressing material facts, or by misleading the shareholders and creditors through a misstatement; or
b) To claim compensation for acts of fraud or suppression; or
c) To declare a resolution proposing the amendment of AoA or MoA as void.
d) committing an act which is contrary to the provisions of the Companies Act, 2013 or any other law for the time being in force.[32]

Under Section 245 **a class action suit can be filed against**:

a) The company or its Directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part; or
b) The auditor or including the audit firm of the company for improper or misleading statement of particulars made in his audit report; or
c) Any expert/advisor/consultant or any other person for any incorrect or misleading statement.[33]

In a Class Action suit certain issues of privity is raised saying that there is no contract between the Shareholders and the Experts, Advisors, consultants[34] etc… But this section goes beyond such issues privity and gives shareholders and depositors the right to file a class action suit against all of them.

Section 245(3)(i) of the Companies Act, 2013 prescribes the following **eligibility criteria** to file a class action suit:

[31] §245(1), COMPANIES ACT, 2013.
[32] §245(1)(g), COMPANIES ACT, 2013.
[33] §245(1)(g), COMPANIES ACT, 2013.
[34] There is a contract between the Shareholders and directors but there is no contract between the shareholders and the experts, auditors etc…

a) One Hundred member or depositors in the company; or
b) Shareholders or members having not less than 10% of the shareholding; or
c) any member or members singly or jointly holding not less than ten percent of the issued share capital of the company, subject to the condition that the applicant or applicants have paid all calls and other sums due on his or their shares & in case companies not having share capital; or
d) In a case where the company does not have a share capital than one-fifth of the total numbers of members can a file a class action suit under Section 245.[35]

A suit under Section 245 can be filed to claim any of the following **reliefs** (The examples provided below are just illustrious as a lot of jurisprudence has not been developed from the Indian point of view):

a) To prevent the company for committing any act which is *ultra vires* or in direct breach of the MoA or AoA; or
b) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors and to prevent them from acting upon such resolution; or
c) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force; or
d) Any other relief which the tribunal deems fit and has the competency to give.[36]

The **Procedure** prescribed under Section 245 is that when a class action suit is filed in the tribunal then a notice has to be given to all members of the class within 7 (seven) days. The notice has to be publishes both in a vernacular newspaper (where the registered office of the company is located), in a leading English newspaper, MCA website, NCLT website and the Stock exchange website (if it is a listed company). Interestingly, under the Draft Companies Rules, 2013, an application under Section 245 of the Companies Act, 2013 cannot be withdrawn without the leave of the Tribunal. If there are more than one class action suit then they should be clubbed into one and the members should chose a lead applicant and if they don't chose one then the tribunal can chose one and the lead applicant shall act on behalf of all.[37]

Section 245 prescribes a **Penalty** that when any of the parties fail to comply with the orders issued by the tribunal then they can be punished with a fine of any amount varying between Rupees five lakh and Twenty five lakh. Penalties are also extended to every officer of the company who is in default, to be imprisoned for a term of no longer than three years and with fine of between twenty-five thousand to one lakh rupees.[38]

Before the NCLT could proceed with the merits of the case, a few procedural hurdles need to be crossed. These hurdles includes the test of good faith and absence of personal interest whether direct or indirect of the members/depositors in carrying the said litigation, examination of prima facie evidence on record as to involvement of any other person other than director or officers of the company and that the cause of action is one which cannot be pursued by the member/depositor on his own right/accord and it is also to be determined as

[35] §245(1), COMPANIES ACT, 2013; §245(3), COMPANIES ACT, 2013.
[36] §245(1), COMPANIES ACT, 2013.
[37] §245(5), COMPANIES ACT, 2013.
[38] §245(7), COMPANIES ACT, 2013.

the probabilities of authorization of the alleged act/conduct or its subsequent ratification or the likelihood of the same.[39] If a petition is found to be false and vexatious then the petition will be rejected and it will be disposed off and an order as to costs shall also be made.

CLASS ACTIONS AND OTHER TOOLS OF COMMERCIAL LITIGATION

Class action suits are one such tool of commercial litigation through which the minority or the shareholders or the depositors can claim compensation for the wrongs which have been committed against them. Other tools of commercial litigation such as a Derivative action, a section 241 suit also known as Suit for Oppression and mismanagement etc... can also be resorted to. This section is going to depict the difference between class action suits and other tools of commercial litigation.

Difference between Class Action suits and Derivative suits:

	Class Action suits	**Derivative Suits**
Who Initiates	Shareholder, Members or Depositors	Shareholder harmed directly.
Defendants	Company or its Directors, Auditors, Expert, Consultant, Advisor etc…	Management and Board
Whether Aggregate Action is allowed?	No it is not allowed as the subject matter of the suit should be restricted to only one claim.	Yes it is allowed.
Cause of Action vests with?	The cause of action vests with the shareholders	Cause of action vests with the Company.
Who pays legal costs?	Corporation if the suit is successful. If it is a vexatious complaint then the plaintiff will pay the cost of the suit and also compensation.	Corporation
Remedies go to	The class in its entirety.	Company

The essential difference between a class action suit and a derivative suit lies in who can initiate a claim and against whom a claim can be initiated. In a class action suit a claim can be initiated by the shareholder, members or depositors or any class as a whole and the action can be against the Directors, Consultants, auditors, experts etc… Whereas a derivative suit is initiated by the shareholders on behalf of the company and the action is instituted against the management or the board.[40]

Difference between Class Action and Section 241 Suit (Oppression and mismanagement):

[39] §245(4), COMPANIES ACT, 2013.
[40] Patrick M Garry et al., *'The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform'*, 49 South Dakota Law Review 285, 302 (2004).

	Class Action Suits	**O&M Suits (Section 241)**
At what point of time a claim can be made?	It can be made even before a wrong is to be committed against the shareholders, Members or depositors.	It can be made only after a wrong has been committed.
Anticipatory Suit of Restraint	Anticipatory Suit of Restraint is allowed in a class action suit.	Anticipatory Suit of Restraint is not allowed in a class action suit.
Who can initiate a claim	A Shareholder, Member or a depositor.	Only a shareholder can.
Common remedy given	Compensation or to declare the action challenged to be null and void.	Replacement of management or buyout of minority shareholders.
Who pays legal costs	Corporation if the suit is successful. If it is a vexatious complaint then the plaintiff will pay the cost of the suit and also compensation.	The shareholders will pay the legal costs.
Whether Aggregate Action is allowed?	No it is not allowed as the subject matter of the suit should be restricted to only one claim.	No it is not allowed.

The essential difference between a class action suit and O&M Suit lies in the reliefs which can be claimed. In a class action suit it is compensation and declaring the action challenged as null and void but in a Section 241 suit it is Replacement of management or buyout of minority shareholders.

In India, the filing of representative actions is recognised under the (Indian) Code of Civil Procedure 1908 (CPC). Similar provisions allowing parties to represent other aggrieved persons in a representative capacity are set out in the Competition act, 2002, Consumer protection Act, 1986 and Industrial disputes act, 1947 as well. Additionally, the concept of class actions has evolved through judicial intervention in the form of Public Interest Litigations as well. A separate provision for a "securities class action" is also provided under section 37 of the Companies Act.[41] Under this provision, a lawsuit can be filed (or any other action may be taken) for a misleading statement, or for the inclusion or omission of any matter in a company prospectus. Such an action can be filed any person, group of persons or any association of persons.

[41] §37, COMPANIES ACT, 2013.

COMPARATIVE ANALYSIS OF CLASS ACTION SUITS IN DIFFERENT COUNTRIES

Class Action suits in England: In England there is no such concept called the class action suits in particular but actually the British law adopts procedures by which claimants with similar claims may group together to bring collective claims against the same defendants (Part 19 of the Civil Procedure Rule UK).[42] Under the Civil Procedure Rules (CPR), two types of collective actions could be brought by claimants. One is a group litigation order (GLO) made by the court, which permits a number of claims concerning common or related issues to be managed collectively (Part 19 of the Civil Procedure Rule UK). The other approach is through representative actions. Under this mechanism, a claim where more than one person has the same interests could be begun or continued by representatives selected from this group of persons (Part 19 II of the Civil Procedure Rule).[43] In a representative proceeding, any order of the court is binding on all persons represented in the claim (19.6 of the Civil Procedure Rule).[44] It is not frequently used because of the narrow interpretation by the courts. A relatively broad interpretation of representative litigation was given in the House of Lords decision Duke of Bedford v. Ellis.[45] In this case, Lord Mac Naughten held that the requirement of 'the same interest' is satisfied if the representative can show a common interest or common grievance and that the relief sought is beneficial to all. However, in a series of later cases, the requirement of common interest was used to give the rule a more restrictive application.[46]

Class Action suits in the United States of America: In the US, all sorts of class actions in the federal courts are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) sets out four preconditions that need to be met before the commencement of a class lawsuit:

a) The class is so numerous that joinder of all members is impracticable;
b) There are questions of law or fact common to the class;
c) The claims or defences of the representative parties are typical of the claims or defences of the class; and
d) The representative parties will fairly and adequately protect the interests of the class.

These four prerequisites are often referred to as numerosity, commonality, typicality, and adequacy of representation.[47]

According Rule 23 (c) of the after the case is filed the court needs to determine whether the suit can be maintained as a class action, and this process is known as class certification. Some of the factors the judge will take into consideration before certifying a class is:

a) Does the court find that there is a question of law or fact common to the members of the class which affects only individual member;
b) will the individual be able to maintain his claim without the class certification;

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[42] Katz, Avery W., '*Measuring the Demand for Litigation: Is the English Rule Really Cheaper?'* 3 Journal of Law, Economics and Organization 156, 167 (1987).

[43] Edward F. Sherman, *'Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions'*, 52 DePaul Law Review 422, 438 (2003).

[44] Neil Andrews, *'Multi-Partv Proceedings in England: Representative and Group Actions'*, 11 Duke Journal of Comparative and International Law 253, 256 (2001).

[45] Duke of Bedford v. Ellis,(1901).

[46] Neil Andrews, '*Multi-Partv Proceedings in England: Representative and Group Actions'*, 11 Duke Journal of Comparative and International Law 253, 267 (2001).

[47] ROBERT H. KLONOFF, EDWARD K.M. BILICH AND SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 68 (West Group 2nd Ed. 2006).

c) Is class action superior to other available methods to achieve fair and efficient disposal of the matter, etc.

These processes impose a significant cost burden on the class which has initiated the suit.

With the new amendment it was made clear that plaintiffs in a class action suit would be permitted to "opt-out" or be excluded from the case.[48] In such a situation a claimant could file the petition on behalf of the other members without their permission and only those who come to know of the litigation would need to submit a form stating that they do not wish to participate in the proceedings. Hence, when individual damages make it too small to claim compensation the tool of class action comes very handy.[49]

Rule 23 does not prescribe any specific number of persons to form a part of the class action suits when compared to the 100 members as prescribed by Section 245 of the Companies Act, 2013. Rule 23 prescribes that the question of law and fact must be similar to the class as the protection of the class is of paramount importance. Rule 23 provides for two kinds of relief i.e., Injunctive and declaratory relief.

Rule 23(e) provides that no class action could settle in settlement unless the court approves such settlement. Sometimes, the settlement agreement is reached even before the class is certified.[50] Under this circumstance, the settlement agreement still needs to be approved by the court. In addition to applying the criteria listed in Rule 23(e) about the approval of settlement agreement, the court also needs to make sure that the class meets the conditions for certification[51] but this rule has sparked a lot of debate on this aspect as to why court permission is need for the certification.[52]

Rule 23 provides that in a addition to the criteria prescribed in Rule 23(a), two more criteria has to be fulfilled i.e., *firstly,* do the common issues 'predominate' over issues affecting only individual members?*Secondly*, is class treatment of an action 'superior' to other alternatives for adjudicating the controversial issue?

In the first criteria only where the questions common to the class predominate over the questions affecting individual members, is it possible to achieve the economies that the device of class action pursues.

Additionally, the court under Rule 23(b)(3) has to look into the aspect of superiority requires the court to assess whether the class treatment is 'superior to other available methods for fairly and efficiently adjudicating the controversy'. In order to do that there are four parameters:

a) the class members' interests in individually controlling the prosecution or defence of separate actions;
b) the extent and nature of any litigation concerning the controversy already begun by or against class members;
c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

[48] DUKE UNIVERSITY, http://law.duke.edu/grouplit/papers/classactionalexander.pdf (last seen on May 18, 2018).
[49] William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?,*94 Michigan L. REV. 1252, 1255 (1996).
[50] John Bronsteen and Owen Fiss, *'The Class Action Rule'*, 78 Notre Dame Law Review 1443, 1445 (2002).
[51] ROBERT H. KLONOFF, EDWARD K.M. BILICH AND SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 311 (West Group 2nd Ed. 2006).
[52] Rowe Jr, Thomas D. *"Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions"*, 7 Ariz. L. REV. 39, 48 (1997).

d) The likely difficulties in managing a class action.

Lastly, financing a class action can be very costly. To fund a class action, a contingency fee arrangement is not commonly used. Rather, the 'common fund doctrine'[53] is of significant importance in financing class actions, where attorneys in a successful class action could collect reasonable fees from the entire monetary remedies after the court's discretion. If the claim is lost (no common fund is generated), the class counsel get no fees.[54]

Rule 23(g) says that the court appoints a counsel for the class after the class is certified. The criteria based on which the counsel is selected is the counsels experience in handling such actions and his knowledge of the applicable law.[55]

In the US securities fraud class action is also a very prevalent concept. In the US, most shareholder class actions (securities fraud litigation) are substantially based on fraud as provided in section 10 (b) of the Securities Exchange Act of 1934 implemented by Securities Exchange Commission Rule 10b-5. In order to make a successful application for securities class action it has to be proved that the defendant made a misrepresentation upon which the plaintiff relied.[56] The Private Securities Litigation Reform Act of 1995 imposed restrictions on private securities actions by aiming at preventing frivolous securities class actions, which were filed by lawyers desiring high amounts of lawyers' fees.[57]

The biggest criticism of securities class action in the USA is an important criticism of American securities fraud actions relies on the allegedly problematic role of plaintiffs' lawyers.[58] In practice, it is common that each class member is only compensated with a small fraction of their monetary losses through a settlement or a judgment in favour of him, while plaintiffs' lawyers appear to be the biggest winners in class litigation.[59]

[53] Boeing Co. v. Van Gemert, 444 U.S. 472 (1982).
[54] John Bronsteen and Owen Fiss, '*The Class Action Rule'*, 78 Notre Dame Law Review 1443, 1456 (2002).
[55] In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003).
[56] Patrick M. Garry, Candice Spurlin, Debra A. Owen, William A. Williams and Lindsay J. Efting, *'The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform'*, 49 South Dakota Law Review 281, 282 (2004).
[57] Jonathan R. Macey and Geoffrey P. Miller, *'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform'*, 58 University of Chicago Law Review 13, 15 (1991).
[58] Jonathan R. Macey and Geoffrey P. Miller, *'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform'*, 58 University of Chicago Law Review 18, 21 (1991).
[59] James D. Cox, *'Making Securities Fraud Class Actions Virtuous'*, 39 Arizona L. REV. 501, 505 (1997).

RARITY OF CLASS ACTION SUITS: THE INDIAN PERSPECTIVE

Section 245 was notified on June 1, 2016. Since the past 2 years there has been rarely an instance where we could see class action suit making headlines or in fact being filed in the NCLT. This is one such area where the tribunals and courts in India are yet to develop jurisprudence. The reasons may be many because while filing a class action suit a lot of hurdles such as the procedural hurdles, financial hurdles and availability of other remedies pose a threat for a class to file a class action suit. This section is going deal with the fact as to why this section has not been used till date when there was sufficient scope for invoking this section. The author shall be highlighting certain issues which have contributed for the lack of growth of this tool of commercial litigation in the Indian legal and corporate structure.

A. Procedural Constraints

The plaintiff shareholders before filing a class action suit have to clear some procedural constraints such as the "Clean Hands Doctrine". In this section we consider Clean Hands doctrine and direct or Personal interest.

1. ***Clean Hands Doctrine:***Before a plaintiff can bring an action on behalf of the class it has to be proved that the action is interest of the entire class and has not been initiated.[60] India has also accepted the clean hands doctrine.[61] However a strict interpretation can cause inconveniences to shareholders although the ultimate benefit is going to accrue to the entire class.[62]

2. ***Direct and personal interest:*** In a class action suit can also cause a lot of inconveniences to the shareholders if the interest is not being given a purposive interpretation by the judicial authority or the tribunals. A shareholder or a member is a person who will initiate the action and he is bound to have some interest but the curtain has to be lifted and it has to be seen that the ultimate interest of the shareholders lies behind all this.

B. Financial Constraints

Class action suits involve a huge amount of money and lawyers also charge a heft amount as fees in class action suit. To worsen it more India doesn't follow a system of contingency fee system (A system where lawyers are paid only when the suit is successful. It is being followed in USA since a long time). In addition to these costs, the presence of often substantial court fees, and the well known delays in the Indian judicial system would further undermine the incentives of shareholders to bring suits. 94 The delay in recovery, coupled with the uncertainty of any recovery, would reduce the real value of any expected judgment.

Meanwhile, the companies act has established the Investor Education and Protection fund which will be used for reimbursement of expenses incurred during any class action pursued under Section 37 or section 245 by any members, depositors, shareholders or debenture holders. Class Action suits cannot be managed with government funds because there will

[60]Barrett v. Duckett, [1995] B.C.C. 362; Nurcombe v. Nurcombe, [1985] 1 WLR 370.
[61]M. Sreenivasulu Reddy v. Kishore R. Chhabria, [2002] 109 Comp. Cas. 18 (Bom).
[62] Payne, Jennifer, *'Clean Hands" in Derivative Actions'* 61 *Cambridge Law Journal* 78, 82 (2002).

always be a threat of mismanagement and there might even be situation where people use political influence to target a particular company. Even in India the loser pays the costs and even the court will impose a cost on the loser but it might not be of such substantial value that it will persuade the shareholders to bring forth a class action suit. Hence, the rule on costs acts as a disincentive against minority shareholders even if they have a valid class action claim against directors or other insiders of a company.

C. Alternative Remedies

There are other tools of commercial litigation which act as an alternative to class action suits. Because of the procedural advantages, less legal impediments, reduced cost and a settled jurisprudence, tilts them towards these kinds of alternative remedies such as Oppression and Mismanagement suits, invoking the SEBI Jurisdiction etc…

1. ***Oppression and Mismanagement Suits:*** The oppression remedy is available to minority shareholders if they can demonstrate that 'the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and that winding up would not be beneficial although there exists grounds for winding up.[63] Even in other commonwealth countries such as the UK these kinds of remedies exist where the minority shareholders are given suitable remedies whenever it is found that the affairs of the company are being conducted in a manner prejudicial to the shareholders (Minority).

   The mismanagement remedy is available where the 'the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company' and that a material change 'has taken place in the management or control of the company … and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or … to the interests of the company.[64]

   The remedy of mismanagement is wider in scope than that of Oppression[65] because the remedy of mismanagement can be claimed where instances of breach of MoA or AoA is said to be there and when there are irregularities which causes loses to the company which in turn reduces the shareholders value.[66]

   Action of Oppression and mismanagement can be filed before the NCLT (As per the 2013 Companies Act), the powers of the NCLT are transferred from the erstwhile CLB which existed under the 2013 Companies Act.[67] The powers of the NCLT have been expanded to include matters pertaining to corporate law, approval of takeover bids, approval of insolvency etc... This did not exist with the CLB.

   The NCLT is the combination of CLB and BIFR (Board of Industrial and financial reconstruction) which makes it evident that the powers of NCLT are much wider than that of the CLB. The NCLT has a wide range of powers including (i) Regulate the

[63] §241, COMPANIES ACT, 2013; §244, COMPANIES ACT, 2013.
[64] S.M. Ramakrishna Rao v. Bangalore Race Club Ltd., [1970] 40 CompCas 1154 (Kar).
[65] Hemant D. Vakil v. RDI Print and Publishing Pvt. Ltd., (1995] 84 CompCas 838 (CLB).
[66] Thomas George v. KCG Verghese, (1996) 86 CompCas 213 (CLB).
[67] In Madras Bar Association v. Union of India, [2010] 11 SCC 1, the Supreme Court decided the constitutional validity of NCLT in the affirmative.

affairs of the company (ii) ordering a purchase of the minority shareholders' stake either by the company or the majority shareholders (3) termination of agreements entered into by the company, including with insiders such as managing director or manager (4) Approval of Mergers (5) Approval of bids to take over insolvent companies who have been declared insolvent under the Insolvency and bankruptcy code, 2016 (6) The NCLT has also been given power for Competition law matters also.

Although the reliefs granted under Section 241 read with section 244 is different than that of section 245 are different yet oppression and mismanagement suits have become a common alternative to class action suits in today's time. Although the CLB does not provide for direct monetary compensation, it has witnessed increasing popularity due to the other remedies it can harness and the relative efficacy of its proceedings.

2. ***Securities law and SEBI Jurisdiction:***Invoking SEBI jurisdiction is a very convenient mechanism for listed companies as the powers of SEBI to regulate listed companies are wide enough to regulate Securites and derivatives market and corporate governance as well. The Board's remedial powers are also very large. Under the Securities and Exchange board of India Act, 1992 and Securities contract (regulation) Act, 1956 the board has wide powers to initiate criminal prosecution, violation of statutes and delisting of companies from the stock exchange as well. Actions against the directors and the controlling shareholders in a listed company are also very much possible by the SEBI. SEBI whenever passing any order takes into consideration two factors i.e., Interest of the investors and the Interests of the Securities market.[68]

   There is a minor difference between the remedies provided by the board and remedies provided by the tribunal when a class action suit is filed. The focus of SEBI ought to be on investor protection rather than remediation of wrongs done to a company by insiders whereas the main focus of class action suit would be to grant compensation and remedy the wrong committed upon the class. [69]

   Invoking the SEBI jurisdiction also essentially means that there is speedy redressal of disputes because of the way it functions.[70] Further, as per section 15 of the SEBI act wherever the act provides SEBI to exercise power in all such cases the civil court will not have any jurisdiction. Therefore, in SEBI minority investors see an effective redressal mechanism because of the cost effective[71] and timely work it does and further there is a compulsion for them to approach the SEBI because of the mandate under Section 15 of the SEBI Act. Therefore, in this scheme, SEBI's mandate extends to ensuring that there are no violations of specific legal provisions that may in turn

[68] Adam C. Pritchard, '*Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers'*, 85 Virginia L. REV. 931, 943 (1999).
[69] Jill E. Fisch, *'Class Action Reform: Lessons from Securities Litigation'*, 39 Arizona Law Review 534, 537 (1997).
[70]Kesha Appliances P. Ltd. v. Royal Holdings Services Ltd., [2006] 130 CompCas 227 (Bom.). The Reserve Bank of India has also noted that when SEBI is empowered to act the civil courts jurisdiction is ousted.
[71] Elliot J. Weiss and John S. Beckerman, *'Let the Money do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions'*, 104 Yale Law Journal 2061, 2072 (1995).

affect the interests of minority shareholders, such as institutional investors and retail individual shareholders.

3. ***Derivative Actions:*** Derivative actions are preferred by shareholders whenever any act of mismanagement has been committed by the management or the board against the company which has resulted in a decrease in the share value for the shareholders. Derivative suits are preferred by shareholders because the legal costs are paid by the corporation and although the direct benefits do not accrue to them but still there is a chance for some indirect benefit as their share value can shoot up.

   Derivative actions are very useful for shareholders whenever private enforcement is desirable, the minority shareholders hold small value of the total paid up capital, the minority shareholders are scattered and when the institutional structure is such that cost is subsidized.[72]

D. Other Constraints

Basically, there might be two reasons which can be the root cause for section 245 not being used in the optimal way as identified by Mr Sandeep Parikh (Founder, Finsec Law Advisors). *Firstly,* lawyers should be allowed to charge contingency fees in class action suits as is the case in the USA where shareholders get hefty compensation for being cheated by companies. *Secondly,* as mentioned before Section 20A bars any civil court from having jurisdiction on any matter that is under the regulatory preview of SEBI.[73]

1. ***Lack of Push Mechanism:***This kind of a mechanism is lacking in India. In the US the lawyers and law firms act as catalyst for class suits as they get a share in compensation granted by courts and the aggrieved person gets legal help or assistance without paying anything from his pocket. Such a mechanism is lacking in India. In the USA law firms are highly incentivised to pursue a class action as they can recover a hefty amount as fees from the compensation given to the class as a whole.[74] In India it is a highly problematic as the client has to first think about the forum he has to approach and then the lawyer and then has to decide as to how he has to pay the lawyer so on and so forth. A mechanism which exists in the USA if adopted in India can be more beneficial to the investors as it will enhance both the investors as well as the lawyers as lawyers are the people who have to lay an active role.[75]

2. ***Concerns in Family Enterprises:***Majority of the enterprises in India are family owned enterprises. This creates hindrances in taking on the enterprise. It is rarely found the members take any action against the head of the business who is usually the head if the enterprise as well. The shareholding in such enterprises is usually

[72] William W. Schwarzer, *'Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 Michigan L. REV. 1250, 1252 (1996).
[73]THE HINDU BUSINESS LINE, https://www.thehindu.com/business/Industry/class-action-suits-ripe-for-review/article19570982.ece (Last visited on May 27, 2018).
[74] William Weiner, Delphine Szyndrowski, "*The Class Action, From The English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread"*, 8 Whittier Law Review 936, 948 (1987).
[75] Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 Columbia Law Review 868, 870 (1977).

centralised so they might not be able to fulfil the 100 shareholders criteria in Section 245 but can fulfil the criteria of 10% or more of the members.[76]

The above stated reasons are some of the concern which exists in the legal framework of class actions suits in India. In the following section the author shall be discussing the remedial measures which can be taken in order to make this provision and this tool of commercial litigation much more effective so that in the days to come we might be able to see them being used more and more whenever shareholders or depositors are manipulated by the company.

RECOMMENDATIONS AND CONCLUSIONS

Section 245 although looks perfect from a first reading but it requires quite a few changes. It need not be in the bare text of the section itself but there is definitely some scope for changes in the way the section can be practically implemented in the court. Section 245 has immense scope considering the present situation in the Indian corporate sector where day in and day out cases of oppression against minority shareholders or cases of frauds are made out. This provision was introduced in order to reduce such cases and if the understated changes are considered and implemented then this tool of commercial litigation can become a suitable measure for minority shareholders or depositors to counter such cases of oppression or frauds in the future.

First, an option of opting out of the class action suits has to be introduced. In the United States of America such a scheme has been introduced where any member who is a part of the class has an option of opting out before a class has been certified. Those who do not opt out will be bound by the effects of the court's judgement or settlement reached between two parties. In the United States there is an option of second opt out where members get a chance to opt out after the settlement between the parties. This infuses a lot of flexibility in class action suits. In India also the same kind of mechanism can be introduced which can provide flexibility to the members who file class action suits to opt out if they feel not to be bound by the outcome of the tribunal.

Second, a scheme of contingency fees has to be introduced. As stated before counsel fees are something which is very huge in class action suits as lawyers try to extract huge amount of monies in the form of fees from the members of the class. If a scheme of contingency fees is introduced then it will act as a check on the amount of fees which is collected by lawyers because if this scheme is introduced then lawyers will be allowed to collect fees only when the suit is won. If the case is lost then the lawyers will not be allowed to collect any fees. This will act as a great mechanism for pushing shareholders and depositors to pursue class action suits.

Third, the structure of cost has to be eased with respect to class action suits. The amount of fees which the plaintiff's pay as court fees and lawyer fees is very huge as this might act as a great hindrance in the future. If the fees are kept the same then there would be no difference in fees between a class action suit and a direct suit. There must also be a framework within which the suits has to be disposed off because by doing this it would boost up the investor confidence and shareholder morale.

[76] UMAKANTH VAROTTIL, VIKRAMADITYA KHANNA, RARITY OF DERIVATIVE ACTIONS IN INDIA: REASONS AND CONSEQUENCES 339 (Cambridge University Press 2012).

Fourth, section 245 has included depositors, shareholders and investors within its ambit but has not included "Creditors" within its ambit. Company does have a contractual relationship with its shareholders and investors but it is not so that the company does not have a contractual relation with the creditors. Creditors do form a class and they must be given every right to introduce a class action suit. To keep them outside the ambit of Section 245 would be unjust and unfair to them. Hence, this is something which the Ministry of corporate affairs can consider to include by issuing a notification.

Class action suits are definitely an important tool of corporate governance. Given the growth of the Indian corporate sector and capital markets and the increase in the number of small and dispersed shareholders, class action suits can be a very viable tool in the near future. But procedural and financial constraints have limited its application in the Indian legal scenario. If the Ministry of corporate affairs can consider the recommendation set forth then it can act as a great mechanism to push the shareholder or investors to go for class action suits as the remedies offered by the tribunal in class action suits is the most appropriate for the harm the class would have suffered. The author believes that there might be better alternatives for enforcing the shareholder rights such as arbitration etc… but improving the legal framework for enforcement of class action suits will allow for a better enforcement of corporate disputes and making commercial litigation much wider by providing a host of well framed alternatives which will improve the overall enforcement of corporate laws in India.

While, Section 245 has not been used to the optimal extent in the past two years it has to be seen how well the course of action shapes up in the future. High counsel fees, delay in judicial system, procedural constraints etc… have halted the growth of class action suits and it now gets interesting to see how the Ministry of Corporate affairs and the Indian judiciary make an earnest efforts to refine this section and improve the implementation of the same in the court of law.

DEMYSTIFYING THE BENAMI LAW: THE FAVORED POSITION AND THE CHALLENGES

~Sakshi Ajmera*

INTRODUCTION

In the recent past, India has witnessed a huge increment in real estate market with an equally tremendous issue of coping with the problem of benami holdings. Certain laws like the Transfer of Property Act, 1882, Indian Contract Act, 1872, Indian Evidence Act, 1872, Income Tax Act, 1961, Indian Trust Act, 1882 along with a few others, lay down provisions and procedures to be followed while undertaking property transactions. In the course of buying, selling and holding property, abiding by the legal terms as set forth by these acts, was a cause of concern. The complicated modus operandi with respect to tax compliance of the owner before the disposal of a property has bothered even the tax authorities. The Income Tax Department thus decided to set up anti-benami units throughout the country. This led to the enactment of The Benami Transactions (Prohibition) Act, 1988[1] (hereinafter referred to as "the Principal Act"). Appertaining to the various loopholes in the act, a new Amendment Act was introduced called The Benami Transactions (Prohibition) Amendment Act, 2016[2] (hereinafter referred to as "the Amendment Act").

Sections 3, 5 and 8 of the Principal Act came into force on 05th September 1988 and the remaining sections on 19th May 1988, after the grant of the President's assent. The Amendment Act came into effect from 01st November 2016.[3]

Through the essay, the author endeavours to give a concise overview of what the benami law is, through a discussion of various terminologies in the Definitions Part. *Secondly*, the essay throws light on historical developments of the law as far as its application in the Indian economic market is concerned. *Thirdly*, it analyses the scope and purpose of the Amendment Act. The fourth section embarks upon the controversy of retrospective or prospective application of the Amendment Act. *Lastly*, the author has tried to highlight recent changes in different Indian laws which will affect the benami transactions and henceforth looking at the way forward, has arrived at the *conclusion* that although the Amendment Act has achieved a laudable motive, the existing law still needs to be revamped to incorporate stringent methods to cope up with the extant loopholes.

DEFINITIONS

The term "benami" has been defined in Merriam-Webster as "made, held, done or transacted in the name of (another person). It's a Persian term that literally means without a name, anonymous, nameless and fictitious, counterfeit or bogus. The word 'benami' has been ostensibly defined in the case of *Meenakshi Mills, Madurai v. The*

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[1] Press Release, " THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 (05-09-1988) < https://dea.gov.in/sites/default/files/Benami%20Transaction_Prohibition_%20Act1988.pdf>

[2] Press Release, "THE BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016" The Gazette of India (10-08-2016) <http://www.prsindia.org/uploads/media/Benami/Benami%20Transactions%20Act,%202016.pdf>

[3] Press Information Bureau, Government of India, Ministry of Finance available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=159882> last updated on (24-03-2017).

Commissioner of Income-Tax, Madras[4]as an expression referring to two classes of transactions. The first category is the usual class where the sale is genuine, but the transferee is not the real transferee. The second category is where the sale was bogus and the title was not intended to pass. In the former category, the title is passed and the transferee becomes the title-holder, while in the latter, the title remains with the transferor.

A "Benami Transaction" as defined in the Principal Act means "any transaction in which the property is transferred to one person for a consideration paid or provided by another person."[5] In a brief manner, a benami transaction is the transfer of property to one on account of a payment made by the other. The subject matter of the transaction is the "benami property" and the property is bought in the name of the "benamidar." The term "property" as used in the act is not restricted to only immoveable properties. As defined under the principal act, "property" means "property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property"[6]. Pondering upon the definition of the term "benamidar", in the case of *Pether Perumal v. Muniandy*[7], the Privy Council defined it as an alias for the real owner, who bestows his name for the purchase of the property and has an ostensible title over the property thus transacted.

HISTORICAL DEVELOPMENTS

Benami transactions have been a part of the Indian dealings since time immemorial. In the case of *Punjab Province v. Daulat Singh and Ors.*[8] Federal Court held that *"This practice has long been common in this country for intending alienees of land to take the document of transfer in the name of their friends or relatives, sometimes with a view to defeat the claims of creditors, sometimes to escape restrictions imposed upon them by the Government Servants Conduct Rules, etc."* These dealings gave rise to forbidden practises like money- laundering, tax-evasion, concentration of land, etc.

The need to statutorily recognise certain laws to regulate these transactions was thus witnessed. Henceforth, the Indian Trust Act, 1882[9] was extended to give statutory recognition to the rationale benami transactions and Courts in India were compelled to enforce them. Transfer of Property Act, 1882[10] provided a justification by stating that there is no hindrance on the transfer of property in the name of one, for the benefit of another. In order to fix any delude of the governmental earnings, the Income Tax Act, 1961[11] introduced provisions to restrict the institution of suits dealing with benami properties. However the illegality of the transactions could not be cramped and so the related provisions in the Indian Trust Act, 1882[12] and the Income Tax Act, 1961[13] were repealed. Thus the Principal Act, on the recommendation of the 57th Law Commission report, was enacted.

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[4]Meenakshi Mills, Madurai, v. The Commissioner of Income-Tax, Madras, 1956 SCR 691.
[5] Section 2(a), The Benami Transactions (Prohibition) Act, 1988, No. 45, Acts of Parliament, 1988 (India).
[6]*Id* at Section 2(c).
[7]Pether Perumal, v. Muniandy, (1908) I.L.R 35 Cal. 551.
[8] Punjab Province, v. Daulat Singh &Ors., AIR 1942 FC 38.
[9] Section 81 & 82, The Indian Trust Act, 1882, No.2, Acts of Parliament, 1882.
[10] Section 5, The Transfer of Property Act, 1882, No. 4, Acts of Parliament, 1882.
[11] Section 281A, The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961.
[12] Supra note 10.
[13] Supra note 12.

PURPOSE AND SCOPE OF THE AMENDMENT ACT

The Principal Act had certain lacunae and was not exhaustive. It fell short of providing an appellate mechanism and also lacked provisions with regard to vesting of confiscated property with the Union Government. On account of such loopholes, the act failed to make an extensive impact on the conduct of benami transactions in India.

The Benami Transactions (Prohibition) Amendment Act, 2016[14] (hereinafter referred to as the "Amendment Act") goes after capturing the black money holders in domestic economy concealed through benami holdings. The motive behind bringing an Amendment Act and not a new Act was to have a broader orientation of the laws and not to grant immunity to those who acquired or were in possession of benami properties on or before 01st November 2016 (the date of commencement of the Amendment Act). The Amendment Act is a synoptic, self-contained code containing the law and the agendum. It has implemented such wholesome changes to the Principal Act and added copious provisions, that calling it just an Amendment Act would be too farfetched. In its entirety, it is a New Act.

NEW LAW- RETROSPECTIVE OR PROSPECTIVE?

Before we put on board the present bone of contention, it is crucial to understand the difference between a retrospective law and a prospective law. The term 'retrospective' has been defined in the Black's Law Dictionary[15] as "looking back; contemplating what is past." In common parlance, it is applied to those acts of the Legislature which operate upon laws that existed before the onset of the act. On the other hand, Black's Law defines 'prospective' as 'looking forward or contemplating the future'. A law is said to be prospective when it is applicable only to cases which shall arise after its enactment.[16]

The application of the Amendment Act with respect to punishments has been divided into two types. *Firstly*, transactions entered into before the commencement of the Amendment Act i.e. 01th November 2016. *Secondly*, transactions entered into after the commencement of the Amendment Act.

1.1 Punishments

Section 3(3)[17] of the Amendment Act states that "whoever enters into any benami transaction on and after the date of commencement of the Amendment Act, shall, notwithstanding anything contained in sub-section (2)[18], be punishable in accordance with the provisions contained in Chapter VII of the Act." Under Chapter VII, Section 53[19] suggests that any person found guilty of entering into a benami transaction in order to defeat the provisions of law or to ward off the payment of outstanding dues to the creditors shall be punishable with rigorous punishment for a term between one and seven years along with a fine of up to 25% of the market value of the property. Comparing the combo of Section 3(3) and Section 53, with Section 3(2), it can be concluded that transactions entered post the Amendment Act, shall get hold of a harsher punishment.

[14] The Benami Transactions (Prohibition) Amendment Act, 2016, No. 43, Acts of Parliament, 2016 (India).
[15] BLACK'S LAW DICTIONARY (9th ed. 2009) available at <https://thelawdictionary.org/retrospective/>
[16] BLACK'S LAW DICTIONARY (9th ed. 2009) available at < https://thelawdictionary.org/prospective/>
[17] Section 3(3), The Benami Transactions (Prohibition) Amendment Act, 2016, No. 43, Acts of Parliament, 2016 (India).
[18] *Id* at Section 3(2).
[19] *Id* at Section 53(1) & Section 53(2).

Holding back on the punishment clause, the Government has been abreast of the fact that the provisions of the Amendment Act cannot be applied retrospectively in light of Article 20(1)[20] of the Indian Constitution. This article adjures that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

1.2 Penalty clause and Seizure of Property

The seizure of property, which is a penal clause, has a prospective effect. In the case of *M/s BRC Constructions Co. Pvt. Ltd. &Anr. v. Union of India &Ors.*[21], the Calcutta High Court held that the Principal Act, as amended in 2016, assimilates the color of a statute in restraint of acts constituting benami transactions. The Amendment Act does not look to create any vested/substantive rights, but seeks to protect transactions which fall within the exception of benami transactions i.e. Section 2(9)(A)(i) to (iv)[22] of the Amendment Act. Additionally, Section 1(3)[23] of the Principal Act provides for prospective application of its penal clauses, contrary to its defining provisions. Henceforth, offences as per the Principal Act would invite punishments only as per that act.

When an act creates a new offense, only those offenders are punished who fulfil all the requirements of the crime as per the act, only after its enforcement. Drawing a parallel, it would cover all the benami transactions included in the elaborate definition provided in the Amendment Act[24], which were left uncovered by the Principal Act. Such transactions were not punishable under the Principal Act and thus cannot be debarred retrospectively. Therefore, seizures cannot be invoked retrospectively in regard to such transactions.

1.3 Attachment and Confiscation of Property

The Amendment Act lays down the procedure for provisional attachment[25], appeal before the Adjudicating Authority and confiscation of attachment by the authority in case of an adverse order, confiscation of property by the Authority subject to order passed by the Appellate Tribunal[26] and appeal before the Appellate Tribunal[27].

Some assesses contend that 'attachment' is a penal action and can only be invoked prospectively. The Apex Court in *Pyare Lal Sharma v. Managing Director, Jammu and Kashmir Industries Ltd. &Ors.*[28]held that it is a basic principle of natural justice that no one can be penalised on the ground of a conduct which was not penal on the day it was committed. Hence, a penal provision cannot have an ex-post facto application.

RECENT TRENDS

[20] INDIA CONST. art. 20, cl. 1.
[21]M/s BRC Constructions Co. Pvt. Ltd. &Anr., v. Union of India &Ors., W.P. 25474(W) of 2017.
[22] Section 2(9)(A)(i), (ii), (iii), (iv), The Benami Transactions (Prohibition) Amendment Act, 2016, No. 43, Acts of Parliament, 2016 (India).
[23] Section 1(3), The Benami Transactions (Prohibition) Act, 1988, No. 45, Acts of Parliament, 1988 (India).
[24] Section 2(9), The Benami Transactions (Prohibition) Amendment Act, 2016, No. 43, Acts of Parliament, 2016 (India).
[25]*Id* at Section 24(3).
[26]*Id* at Section 27.
[27]*Id* at Section 48(2).
[28]Pyare Lal Sharma, v. Managing Director, Jammu and Kashmir Industries Ltd. &Ors., 1989 SCR (3) 428.

The Ministry of Corporate Affairs infused Rule 9A[29] to the Companies (Prospectus and Allotment of Securities) Rules, 2014. As per the inserted rule, all unlisted public companies can now issue securities only in dematerialised form. The issuance has to be in accordance with the provisions of the Depositories Act, 1996[30]. The rule will come into force on 02nd October 2018. Even in case of fresh issues or buyback of securities, the directors/ promoters/ Key Managerial Personnel have to convert their extant holdings into demat form.

The central purpose behind the enactment is to detect and/or curb benami shareholdings by bringing dematerialised shareholdings under the bracket of certain regulatory measures such as taxing requirements, money-laundering, profiteering, etc.

IMPLEMENTATION CONCERNS

With only three weeks to put the rule into action, the implementation of the rule in a smooth manner is not likely to happen. There is a high probability for the new provision, not to reach all related companies timely and eventually leading to non-compliance or a delay in compliance. The consequences of such non-compliance are unsettled. The process is assumed to be time-consuming. Such a dilapidated structure may prove to be a getaway for benami shareholders thus impeding the very purpose of the newly enacted rule.

APPLICATION TO PROPERTIES OWNED ABROAD

The definition of property[31] in the Amendment Act is immensely extensive and does not clearly specify the inclusion or exclusion of the applicability of the Act to properties located abroad. In a parliamentary debate on 02nd August 2016, the Finance minister, Mr Arun Jaitley, clarified that assets owned abroad are not covered under the act. They would be covered under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015[32]. A judicial decision clarifying the same is much awaited.

CONCLUSION

The multitudinous steps taken by the Government of India in the form of demonetisation, linking bank accounts with Aadhaar and PAN, the constitution of SIT on Black Money, Double Tax Avoidance Agreement (DTAA), etc. have disclosed that besides accumulating black money in the form of cash, tax-evaders take on substitute channels. Acquiring benami properties is one such channel. Through this, they easily defraud the public revenue schemes and defeat the authentic claims of the creditors. To that end, the Principal Act and the Amendment Act have conquered up to a commendable task. Nevertheless, the Amendment Act is still obscure on certain high-priority issues such as application of the act to properties owned abroad, retrospective or prospective application to transactions entered before the coming of the Amendment Act and its enjoining with the other Indian laws, amongst others. The law thus needs to be revamped either through amendments or through judicial intervention. The aforementioned course

[29] Press Release- Government of India- Ministry of Corporate Affairs Notification "COMPANIES (PROSPECTUS AND ALLOTMENT OF SECURITIES) RULES, 2014" available at <https://mca.gov.in/Ministry/pdf/CompaniesProspectus3amdRule_10092018.pdf>

[30] The Depositories Act, 1996, No. 22, Acts of Parliament, 1996 (India).

[31] Section 4(8), The Benami Transactions (Prohibition) Amendment Act, 1996, No. 43, Acts of Parliament (India).

[32] The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, No. 22, Acts of Parliament, 2015 (India).

of action would thus be the most feasible and will guarantee a crystal clear flow of money in the Indian economy

SAFEGUARDING THE BREACH OF DUTY BY DIRECTORS : AN ANALYSIS OF "THE BUSINESS JUDGEMENT RULE" IN INDIA

~ **Mahima Gherani&AbhuSoanal Dash**[*]

Abstract:

The "Business JudgmentRule" is a judicially engendered doctrine that bulwarks directors from personal civil liability for the decisions they make on behalf of a corporation. The business judgment rule therefore becomes a protective measure for directors against liability imputations. In today's era of corporate scandals, ecumenical financial meltdowns, and directorial malfeasance, it has become especially paramount in setting the bar for when directors are congruously responsible to shareholders for their actions. It protects honest directors from liability where a decision turns out to have been an unsound one, and at the same time prevents the stifling of innovation and venturesome business activity. The rule is a 'standard of non-review of the merits of a business decision corporate officials have made'. This article provides an analysis of the directors duty to act with care, skill and diligence and the purview of this rule in India. It further seeks to advance the opinion that in determining conformity with the business judgment rule, conformity with both legislative as well as good governance criteria is essential, as it would play a crucial part in the balancing act between dictatorial autonomy and accountability in the present economic climate.

Keywords: Director, Duties, Liability, Business Judgment Rule.

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INTRODUCTION:

Referred to as the Immunity Doctrine, the Business Judgment Rule is a judicially created doctrine that protects directors from personal liability for decisions made in their capacity as a director, so long as certain disqualifying behaviours are not established.[1] The business judgment rule ensures that decisions made by directors in good faith are protected even though, in retrospect, the decisions prove to be unsound or erroneous.[2] The business judgment rule is not a rule of conduct, but, rather, a principle of judicial review under which the decisions of corporate directors are afforded great deference when those decisions are challenged as violating the standard of care.

Having its roots from the common law and then in America from the nineteenth century, this rule has been called one of the least understood concepts in the entire corporate field and is often misunderstood. There exists a general interdependence between risk and return, and directors today are too apprehensive about their personal liability to take risks with the corporations business, which makes it difficult for the courts to determine whether the directors of a company properly evaluated the risk and made the 'right' business decision. In order to maximize shareholder wealth and grow a corporate enterprise, directors must often make business decisions that entail an assumption of risk; very seldom does return exist without risk, and there is generally presumed to be a positive correlation between the two.[3]

One utilitarian objective of the business judgment rule, then, is to keep courts out of a role they are ill- equipped to perform. Another is to encourage others to assume entrepreneurial and risk-taking activities by protecting them against personal liability when they have performed in good faith and with due care, however unfortunate the consequence. The majority of courts has concluded that the business judgment rule protects a determination of management not to sue, with the result being that if appropriate procedures are followed, a stockholder's derivative action pursuing a claim of the corporation will be dismissed.[4] This conclusion follows from the principle that the directors of the corporation are statutorily charged with managing its affairs, and if the directors determine that prosecution of a claim against another is not within the corporate interest, that decision is accorded the protection of the business judgment rule, which operates to abort the shareowner derivative action. Perhaps the most frequently quoted articulation of this principle is the passage by Justice Brandeis in a case concerning the enforcement of an antitrust action against competitors, where it was written:

"Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by a vote of the stockholders. Courts interfere seldom to control such discretion intravires the corporation."[5]

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[1]Stephen M. Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 VAND. L. REV. 83, 90 (2004).

[2] Business Judgment Rule, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/business_judgment_rule (last visited Oct. 18, 2017).

[3]Manuel Nunez Nickel & Manuel Cano Rodriguez, A Review of Research on the Negative Accounting Relationship Between Risk and Return: Bowman's Paradox, 30 Omega 1, 1 (2002), available at http://www.sciencedirect.com/science/article/pii/S0305048 30100055X.

[4]See *Hawes v. City of Oakland*, 104 U.S. 450 (1882); *Continental Securities Co. v. Belmong*, 206 N.Y. 7, 99 N.E. 138 (1912).

[5]*United Copper Sec. Co. v. Amalgamated Copper Co*., 244 U.S. 261, 263-64 (1917).

To impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns for investors by taking business risks.[6] Accordingly, the business judgment rule evolved to give some comfort to directors that they were not being looked to as guarantors for all corporate actions being taken whilst at the helm.[7] Courts view this rule as a standard of liability as it forms the real test to determine if a directors conduct gave rise to any personal liability in the course of the employment. The business judgment rule focuses on the mechanisms and procedures used by the board of directors in arriving at its decision, rather than the "after the fact examined" wisdom of that decision.[8] The directors, consequently, are not liable for, and decisions will not be set aside due to, a mere error in judgment.[9]The rule operates as both a procedural guide for litigants and a substantive rule of law. As a rule of evidence, it creates a "presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and the honest belief that the action taken was in the best interest of the company."[10] The whole concept of this rule arises when the director is in breach of his fiduciary duty or the duty of care that is expected from him towards the corporation. In order for the business judgment rule to apply all that need be shown is that the "directors employed a rational process and considered all material information available."

The role of the business judgment rule has been defined as follows:

Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in 8 Del. C. § 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors.The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.[11]

In *Aronson v. Lewis*[12], the Delaware Supreme Court attempted to restate the rule and its function: "It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption." Though the court clearly laid down the rule, it recognised significant limitations. First, the rule protects only "disinterested" directors; thus, independent judgment is assumed. Second, the rule protects only directors who make informed decisions based on all available mate- rial information. Third, the rule protects only "decisions." The business judgment rule does not shield dereliction of duty. The limitations noted in Aronson are hardly revolutionary. The court's recognition of these restrictions, however, is significant. Thus, under the Aronson restatement, the business judgment rule functions as more than a rebuttable presumption or a rule of judicial behavior. The rule also establishes a standard of conduct for officers and directors.

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[6]*In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 126 (Del. Ch. 2009).

[7]*See* E. Norman Veasey & Christine T. Di Guglielmo, What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Develop- ments, 153 U. PA. L. REV. 1399, 1424–25 (2005).

[8]The efficacy of relying upon a review of process has been often criticized. *See*, e.g., Leo Herzel& Leo Katz, Smith v. Van Gorkom: The Business ofJudging Business Judgment, 41 BUS. LAW 1187, 1190 (1986).

[9]*Radol v. Thomas*, 772 F.2d 244, 256-57 (6th Cir. 1985); *Holland v. Am. Founders Life Ins. Co. of Denver*, 376 P.2d 162, 165-66 (Colo. 1962).

[10]*Cede & Co. v. Technicolor*, 634 A.2d 346 (Del. 1993).

[11] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1975).

[12]473 A.2d 805 (Del. 1984).

In 1985, the Delaware Supreme Court issued a landmark decision in *Unocal Corp. v. Mesa Petroleum Co.*[13], which held that in cases involving defensive actions by a target board of directors, the burden of proof shifts to the defendant to show both (1) that the directors reasonably perceived a threat to the corporation, and (2) that the directors' defensive responses were proportional to that threat. Unocal described the relationship of these standards to the business judgment rule as follows:

"Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."

The 2007-2009 Citigroup[14] shareholder derivative litigation reflects a very recent application of the business judgment rule, applied directly to the current financial crisis. The Citigroup court summarized the shareholders' claims as attempting to hold the directors personally liable for making, or allowing to be made, business decisions that, in hindsight, turned out poorly for the company. This type of decision making, according to the court, falls within the business judgment rule: ―a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. The burden is on the shareholders who are challenging the directors' decision to rebut this presumption. In dismissing the plaintiffs' complaint, the court stated that absent an allegation of self interestedness or disloyalty to the corporation, the business judgment rule prevents a judge or jury from second guessing director decisions if they were the product of a rational process and the directors availed themselves of all material and reasonably available information. The Citigroup court repeated the rationale of the business judgment rule and stated that, discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses.

Further, in *In re Dow Chemical Company Derivative Litigation*[15], the Delaware Chancery Court emphasised that it is not the substance of a board decision, but only the decision making method, that can be reviewed by a court under the business judgment rule. In 2009, the Delaware Supreme Court examined in detail the good faith requirement under the business judgment rule inthe case of *Lyondell Chemical Company v. Ryan*[16]. Lyondell presents one of the complicating factors associated with the business judgment rule, that is the Delaware's General Corporation Law permits corporations to include in their charter an exculpatory provision protecting directors from personal liability for breaches of the duty of care. To defeat such an exculpatory clause, plaintiffs, like those in Lyondell, must allege that the directors breached their duty of loyalty, which cannot be exculpated. To establish a breach of loyalty, plaintiffs must prove the directors failed to act in good faith. Directors' failure to act in good faith is most typically shown by: (1) intentional acts with a purpose other than that of advancing the best interests of the corporation; (2) intentional violations of applicable law; or (3) intentionally failing to act in the face of a known duty to act, demonstrating a conscious disregard for their duties.

[13]493 a.2d 946 (del. 1985).
[14]*In re Citigroup Inc. Shareholder Derivative Litig*., 964 A.2d 106 (Del. Ch. 2009).
[15] No. 4349, 2010 Del. Ch. LEXIS 2 (Del. Ch. Jan. 11, 2010).
[16]970 A.2d 235, 239 (Del. 2009).

Further, in the context of a controlling stockholder transaction, the board of directors also stands in a potential conflict of interest. Until recently, the Delaware courts have treated these transactions under the "entirefairness" standard, making the business judgment rule inapplicable. However, in the 2014 Delaware Supreme Court in the case of *Kahn v. M&F Worldwide Corp*[17], identified conditions under which the protection of the business judgment rule may be available. The Court said the rule protection is available "if and only if" several conditions were met: (i) the controller conditions the approval of the transaction on the approval of both a special committee and a majority of the minority shareholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no; (iv) the special committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority. If these conditions are satisfied, "the only avenue left to the plaintiffs is an argument of substantive irrationality."

The Delaware jurisprudence on the business judgment rule "reflects a general reluctance by Delaware courts to assume responsibility for the substance of business decisions." Even in the more fraught contexts, the Delaware courts use the business judgment rule to "mark the point at which their responsibility for evaluating the decision ends."

Where the business judgment rule applies, a director will not be held liable for a decision, "even one that is unreasonable" and results in a loss to the corporation, so long as the director was not grossly negligent in reaching the decision. The plaintiff is required to show gross negligence in order to surpass the presupposition of the business judgment rule. Liability may be avoided in the absence of causation or damages, or where the directors can establish the fairness of the challenged transaction. The decision, in such instances, will be respected, and the directors will not be exposed to personal liability.

Coming to Indian scenario, the scope of Business Judgment rule is still in the budding stage and has to go a long way before being codified under the prevailing statute. The Courts time and again have been always relying on the various duties of the directors which include the duty of care (skill and diligence) and duty of loyalty. The major drawback of the Indian Courts, is that have not interpreted and applied this rule explicitly under the statute and most of the time depend on the foreign precedents available. Thus, the Business Judgment Rule has not been made mandatory and the primary basis that the Courts adopt to understand this is to rely on the various duties that are embodied in the statute.

Before the Indian Companies Act was enacted (hereinafter referred to as the 'Act'), there were no codified law with regards to the fiduciary duties of directors on the said aspect, except for Section 291 which contained provision which dealt with the general powers of the board of directors. Duties of directors were laid down by courts by looking at common law principles. And although the law regarding this had evolved over time through judicial decisions, there still was great degree of uncertainty. The absence of statutory law coupled with the lack of cases on directors' duties and liabilities, posed a problematic scenario. To alleviate this situation, an attempt has been made for the first time ever in India to codify the duties of directors through section 166 of the new Act. India has thus emulated other common law jurisdictions, like the United Kingdom, through codification of directors' duties.

These newly introduced provisions by CA-2013 regarding the duties and responsibilities of the directors, including the independent directors, not only provide greater certainty to the

[17]88 A.3d 635 (Del. 2014).

directors regarding their conducts and responsibilities, and thus, ensuring better and impeccable corporate management and governance; but also enable and empower the beneficiaries, regulators, and the courts, to judge, regulate, and control the activities and obligations of the directors more objectively and effectively. Ours this well-drafted web-article offers very useful and fertile information exclusively about these new provisions of the Indian Companies Act of 2013, connected with the roles, duties, and responsibilities of the directors and independent directors of public limited companies.[18]

The J.J. Irani Committee set up by the ministry of corporate affairs, recognized the importance of inclusion of duties of director into codified law.[19] The committee was all for the codifying general duties of directors such as; "duty of care and diligence", "exercise of powers in good faith", "duty to have regard to the best interest of the employees", etc. Section 166 as it reads today first featured in the Companies Bill, 2011.

The duties and responsibilities of the directors as enshrined in the Indian Companies act 2013, can be classified into the following two categories: ---

[i] The duty of care, skill and diligence, which requires the director and encourages them to invest their efforts and time to the company affairs and in providing resolutions of various business-related issues which are raised through "red flags", and in taking decisions which do not put the company under unnecessary risks.

[ii] Fiduciary duties which ensure and secure that the directors of companies always keep the interests of the company and its stakeholders, ahead and above their own personal interests.

The following duties and liabilities have been imposed on the directors of companies, by the Indian Companies Act of 2013, under its Section 166: ---

• Section 166(1): A director of a company shall act in accordance with the Articles of Association (AOA) of the company.

• Section 166(2): A director of the company shall act in good faith, in order to promote the objects of the company, for the benefits of the company as a whole, and in the best interests of the stakeholders of the company.

• Section 166(3): A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

• Section 166(4): A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

• Section 166(5): A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

[18] A Guide to Board Evaluation, The Companies Act, 2013 Series, ICSI Available at https://www.icsi.edu/portals/0/guide_to_board.pdf, Accessed on 20th October 2017.
[19] Report of the Expert Committee on Company Law, May 2005 ('Irani Committee'): (2006) 1 Comp LJ 25 (Journal).

• Section 166(6): A director of a company shall not assign his office and any assignment so made shall be void.

• Section 166(7): If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one Lakh Rupees but which may extend to five lakh Rupees.[20]

In the case of *Sri Marcel Martins vs. M. Printer &Ors.*[21], the court said the expression "fiduciary capacity" implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. It extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.

Also in the case of *CBSE and Anr. Vs. Aditya Bandopadhyay and Ors*[22], it was held that the fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or things belonging to the beneficiary. Fiduciary duty is broadly categorized into, Duty of Care and Duty of Loyalty.

The intention of the legislature in bringing stakeholders as varied as employees, shareholders, the community and even the environment is praiseworthy. However this section does not render the directors accountable. Thus when a legislation provides for protection of the public, the provision is rendered irrelevant when the class to which the it is sought to be applied is not easily recognized. A close reading of the presents section allows us to conclude that it is a motley of easily identifiable elements like shareholders and employees along with vague groups like the community. Thus it would provide a cause of action to any person from the society giving rise to a problematic and absurd scenario.

Duty of care entails that the director acts with his knowledge, skill and experience in carrying out the functions and role of a director in the company as expected. Section 166 (3), CA 2013 states that Duty of care imposes upon directors a duty of competence or skill – to act with a certain level of skill, and a duty of diligence. The Court in *InRe Walt Disney Co. Derivative Litigation*[23] the court stated that "Directors must "act in an informed and deliberate manner" prior to making a business decision. Gross negligence is the standard in determining if there has been a breach of the duty of care. Duty of care entails a duty to act with reasonable prudence, includes duty to seriously deliberate matters that comes before them. It includes the duty not to be oblivious to what is obvious. Supreme Court in *Official Liquidator v. PA Tendolkar*[24], held:

"A director cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and be compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission". Test of Reasonable Prudence calls for exercising prudence as expected of a person having equivalent knowledge, experience and skill.

[20] Available at https://www.hg.org/article.asp?id=33097. Last accessed on 22/10/17
[21] MANU/SC/0333/2012.
[22] (2011) 8 SCC 497.
[23] 906 A.2d 27, 53 (Del. Ch. 2006).
[24] AIR 1973 SC 1104.

SEBI in his order in the matter of *Pyramid Saimira Theatre ltd. v. SEBI*[25] stated that "Duty of care for an independent director calls for exercise of independent judgment with reasonable care, diligence and skill which should be reasonably exercised by a prudent person with the knowledge, skill and experience which may reasonably be expected of a director in his position and any additional knowledge, skill and experience which he has".

The Securities Appellate Tribunal in the Pyramid Saimira case, referred to the English case of *Equitable Life Assurance Society*[26], to establish the dimensions of 'duty of care' where the court said that the "Directors have a duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable due discharge of duties as directors."

Tests of Diligence under this case, was further explained in this case wherein it was held that;

- Demonstrate due care and diligence while verifying documents placed for approval in board meetings.
- Identify deficiencies wherever possible by employing verification and scrutiny expected of a prudent man.
- A director cannot take a stand that he has approved the documents totally depending on the integrity and expertise of the management.
- While functions may be delegated to professionals, the duty of care, diligence, verification of critical points by directors cannot be abdicated.

According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A), "due diligence" in law means doing everything reasonable, not everything possible'. The Supreme Court in *ChanderKanta Bansal v. Rajinder Singh*[27] stated that "due diligence means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs." The test of diligence is essentially fact-based.

Duty of Loyaltyrequires that directors act "in the interest of the company". Under Companies Act, 2013, a director is required to act in good faithto promote the objects of the company for the benefit of its members and in the best interests of the company, its employees, shareholders, community and for protection of environment. The definition is broad in the respect that it requires ensuring benefit of key stakeholders which includes its shareholders. Independent Directors are required to ensure that interests of all stakeholders, particularly minority shareholders, are duly considered as part of Board deliberations. Duty of loyalty, as interpreted by courts in *Dale And Carrington Invt. P. Ltd. vs P.K. Prathapan and Ors.*[28] means "that acts and deeds of directors must be exercised for the benefitof the company."

Duty of Loyalty requires directors not to engage in transactions that involve a conflict of interest. According to section 166(5), Companies Act 2013, a director shall not achieve or attempt to achieve any undue gain or advantage, either to himself or relatives, partners or associates. In *Ivanhoe Partners v. Newmont Mining Corp*[29] it was stated that "Directors have

[25] MANU/SB/0060/2010.
[26] (2003) EWHC 2263 (Comm).
[27] (2008) 5 SCC 117
[28] 2004 Supp.(4) SCR 334.
[29] 535 A.2d 1334, 1345 (Del. 1987)

an "affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage."This case impliedly states that the Business Judgment Rule involves the directors duty of loyalty towards the company and to take decisions on a well informed basis.

In Dale And Carrington Invt. P. Ltd. vs P.K. Prathapan and Ors.[30]The acts of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Lord Greene of Delaware Supreme Court in *Stone v. Ritter*[31] said "where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith. Directors must exercise their discretion bona fide in what they consider- not what a court may consider is in the best interests of the company. While acting in best interest, a director must carefully weigh commercial interests of the company on one hand while also taking into account the safeguarding of the interests of the stakeholders, on the other. While doing so, the director must ensure that his actions conform to the standards of those of a reasonably prudent person. The duty of good faith sets a higher standard than the best interest criterion." [32]

Duty of loyalty requires a director to demonstrate that actions taken were in 'good faith' and in best interests of the company. Courts must be convinced that decisions taken by the director were not with a wrong intent or purpose, and hence not in 'bad faith'. The test of purpose behind a decision is used as a measure. In re Walt Disney Co. Derivative Litigation[33] the court stated that "To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation."

According to the case of *Madoff Securities v. Stephen Raven*[34], a director owes a duty to the company to act in what he honestly considers and believes to be in the interests of the company. Thus a director would not be held to have failed in fiduciary duty if they act in good faith in what they believe, on reasonable grounds, to be the interests of the company as given in the case of *Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others*[35].

Independent Directors are legally accountable only in respect of such acts of omission or commission by a company which occurred with their knowledge, attributable through board processes, and with consent or connivance, or where he had not acted diligently.[36]

This is equivalent of the 'business judgment rule, as prevalent in the United States, where courts have held the court will not second-guess a board's decision if it:

- followed reasonable process
- took into account key relevant facts

[30] Supra note 27.
[31] 911 A.2d 362 (Del. 2006).
[32] Available at http://lawtimesjournal.in/fiduciary-duties-director/. Accessed on 22/10/17
[33] Supra note 19.
[34] 2013 EWHC 3147 (Comm).
[35] (1981) 3 SCC 333.
[36] Section 149(12), CA 2013.

- Is made “in good faith” - “good faith” requires that the board act without conflicts of interest and not turn a blind eye to issues for which is it responsible.

According to a circular of the Ministry of Corporate Affairs issued in 2011, board process includes meeting of any committee of the Board, and any information which the director is authorized to receive as director of the Board as per the decision of the Board. They include formal channels of communication such as circulars, agenda, resolutions, etc. made available to Board members. In determining whether a director had acted in accordance with law, prosecuting agencies would examine Board minutes of the company to arrive at a conclusion as to whether the Independent Director is responsible for any violation of law.Minutes that detail a board’s deliberations serve to bolster the defense against a claimed breach of the director’s duty of care.

CONCLUSION:

In summary, the business judgment rule in practice operates both as a restraint on judicial behavior and a standard of managerial conduct. The rule is properly invoked only when an independent and informed board of directors has made a decision in good faith. Once invoked, the rule imposes a substantial burden of proof on the plaintiff. The primary justification for the rule include that the judges are not business experts and would not be the right ones to decide and differentiate between a well informed decision and an erroneous one. Secondly, this rule encourages the directors to take risks in business with the belief that the rule provides necessary reassurance for the directors. Thirdly, the rule is premised on the existence of an alternative economic remedy for an aggrieved shareholder.

The introduction of the Companies Act 2013 is indeed a positive step towards the development of company law jurisprudence in India for the purpose of codifying the duties of the directors. The legislature, through this, has tried to make a conscious effort to bring the law in India in line with internationally accepted practices prevailing all around the globe as analyzed above. The risk of the director being left accountable to none due to differences in interests is a cause of concern. Moreover, there is also the problem of provisions not being enforced due to lack of enforcement mechanism. Also, it is essential that the Courts now give a clear picture of the situations where the business judgment rule protects the directors and incorporate it statutorily in India. Harmony must be sought to see that the negligent directors are not always shielded under the umbrella of this rule and thus fulfill their duties with due care and diligence that they owe towards the company. Thus the courts in India now have been left with the unenviable task of striking such a balance as to finding a middle path in reconciling the two extremes.

LENIENCY PROGRAM AND ITS EFFECTS ON INDIAN MARKET

~Abhijit Sinha[*] &B. Shravya[**]

ABSTRACT

Leniency programmes are definitely one of the most effective cartel detection tools, their efficacy enhances when they are coupled with robust investigation and strict penalties. To benefit from existing leniency programmes, a jurisdiction must pro-actively fight against cartels. If this is not done, then all the efforts invested in developing clear and expanded leniency rules will be wasted. With respect to leniency programmes the trend is towards restricting information originating, ultimately, from leniency applicants. Thus one country cannot rely on another country to generate information for follow-on domestic proceedings. We have to note that while
trying to extend the reach of leniency policies to a majority of countries it is pertinent to keep in mind that the model useful for developed countries may not be effective as the model for developing countries, simply because commercial perspectives cannot have a one-size-fits-all formula. For this reason we have undertaken an analysis of emerging market economies and their experiences with leniency programmes. Along with the other detection and investigation means at the Commission's disposal, the leniencypolicy has turned out to be very successful in fighting cartels.

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INTRODUCTION

Competition and the market have always been the predominant facets of thecapitalist economic system since the classic liberal didactics of John Locke which were later furthered by Adam Smith. Over the previous 50 years, the market has become something like a tussle ground between the two legal disciplines of competition and intellectual property, with the former trying to free and de-sector it whilst the latter has endeavored to restrain and limit the market. Moreover, following the financial crash of 2007-2008 innovation, with competition and intellectual property holding sway on policy levers, has become an integral aspect of developing, and in particular, western countries' economies, and thus the global market. To this end intellectual property, mainly because of the emphasis on property, has received remarkable academic attention over the philosophy focusing the legal regime, which has then been used as a means to justify the rights that ensue. Competition on the other side has experienced lesser of this attention, with most attention being focused on goals, end results and objectives without going deeper into the philosophical underpinnings of the discipline.

Meaning of Cartel

Cartel is an illegal clandestine agreement entered between competitors to fix prices, restrict supply and/or divide up markets. The agreement may take different types of forms but often pertains to sales prices or enhancement in such prices, constraints on sales or production capacities, sharing out of product or geographic markets or customers, and fixing on the other commercial terms for the sale of products or services. Cartels are considered as illegal, they are generally highly secretive and proof of their presence is very difficult to find. The *"leniency policy"* prompts companies to hand over inside proofs of cartels to the European Commission. The first company in any cartel to do the same is exempted from fine. This leads to cartel being destabilized. In the recent years, majority of the cartels have been unearthed by the European Commission after one cartel member confessed and pleaded for leniency, though the European Commission also successfully pursued its own investigations to find out cartels.

Hardcore cartels[1] are globally recognised as the worst form of competition law offence. "*Leniency programmes*" are considered as the panacea now-a-days for deciphering such cartels and establishing the evidence for proving their existence and ramifications. However, the effectiveness of this program depends upon the factor that what is the quantum of punishment and whether it is sufficient, if the cartelists do not seek any leniency under the programme. These programmes consist of certain pattern of penalties to instill a commitment which intends to enhance the incentives to cartelists for self-reporting to the competition law authorities.

Cartel is the most egregious economic offence in any nation which stifles the development of the nation & it is just not restrained to a specific nation but has extended its purview like a

[1] "Hardcore" cartel conduct has been defined by the Organization for Economic Cooperation and Development (OECD) as: "an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." (OECD, 1998) Throughout this paper, the term "cartel" should be read as "hardcore cartel."

disease in other spheres of the world, where cartel consisting of firms exceeding one nation, work for several years nominally were not legal due to their clandestine nature. International cartel activities were therefore majorly not prominent and were clandestine in nature; however, in early1990s with reforms in the State policies & role, U.S. & EU developed &improved their enforcement activity which in turn enhanced the cases of prosecutions to thwart such cartel activities. Enterprise when get indulged in such agreements by the way of forming a cartel when they decide to connive upon output or set prices, they may set target or minimum prices, rig bids at auctions, set volume or market share quotas, allocate markets geographically or allocate major customers to specific member firms. International cartels are discerned by the fact that the cartel members consist of firms from more than one nation. In the first half of the 20th century, when several nations supported rather than prosecuted inter firm connivance, international cartels affected a wide range of goods. With decreasing tariffs and an increasing number of multilateral trade agreements, international trade has risen up, expanding the range of products at risk for international price fixing.

Section 2(c) of the Competition Act, 2002 (the 2002 Act) defines 'cartel' as including "an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;".

In easy words, cartelization can be understood as a collective bunch of sellers orbuyers or enterprises coming together to decrease or wipe off competition in the market, including agreement between the group to not to compete on customer, price or products[2]. There are various negative ramifications of cartelisation, some of them being:

a) Increase in the price of the commodity above competitive levels,

b) Higher prices for the commodity,

c) Bad quality,

d) Less or no choice for goods or/and services and

e) Loss to the consumers and the economy.

It is an agreement among competing parties not to compete or affect the level of competition within the group. However, Section 3(5) (ii)[3] of the 2002 act does not include cartels specifically for exports for the anti-competition agreement provisions. In the landmark decision of the *Builders Association of India v. Cement Manufacturers' Association and Others*[4], the Competition Commission of India(CCI) passed an order slapping a fine of around six thousand crores (*approx*.USD 1.1 billion) on 14 cement companies after concluding that these companies are involved in cartelisation in the cement industry. The CCI laid their finding on the circumstantial evidence put forth by the petitioners, and held that where violation of Section 3 (a) and (b) of the 2002 Act has been established, there is a presumption of adverse on competition[5].

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[2] Order of Commission, http://competitioncommission.gov.in/advocacy/PPCCI_ CartelsNew_7_12.pdf, p.1, accessed on 15th September, 2018.

[3] The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

[4] Order of Commission, http://www.cci.gov.in/May2011/OrderOfCommission/CaseNo29of2010MainOrder.pdf, accessed on 15th September, 2018.

[5] Ibid

Economic theory behind cartels

OECD Recommendation define "hard-core" cartel as: *…an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to temper prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce*[6].

A cartel is generally a bunch of sellers or buyers who group together and endeavour to affect the competition. The economic term for grouping together is 'collusion'. According to the economic theory there are two kinds of collusion: express and tacit collusion[7]. Express collusion, which is banned under the law, is the direct communication of the participants with each other in furtherance of the object of cartelisation. However, tacit collusion is allowed, which consist of the repeated parties of the parties to enable to earn supra-normal profits, over the equilibrium situation.

Leniency Programmes

Companies that have indulged in illegal cartels have a limited chance to evade or reduce a fine. The Commission provides a leniency policy under which the companies that furnish information about a cartel in which they participated shall be entitled to full or partial immunity from penalties. Along with the other detection and investigation means at the Commission's disposal, the leniencypolicy has turned out to be very successful in fighting cartels.

The provision of leniency under Section 46 of the 2002 Act is not at same footing with the UK law, which prescribes full immunity to the persons who assist the authorities in busting of the cartel. The modern case of cement cartel in India has reinitiated the moot about discovering and applying an ideal policy for cartel detection, because the same is very difficult in a particular industry. The CCI is a budding organisation, which was formed in 2009, consisting of a Chairperson and six other members, appeal from whom lies to the Competition Appellant Tribunal, and then to the Supreme Court.

In the renowned matter of *Aalborg Portland A/S v. Commission of the European Communities*[8], the court held that the assistance from economic analysis in detection of cartel can only be used in case there is lack of sufficient documentary evidence to prove existence of a cartel.

In nutshell, the leniency policy proposes companies involved in a cartel which themselves report and hand over the evidence, either the full protection from fines or a reduction of penalty which the Commission would have otherwise imposed on them. It also helps the Commission, allowing it not only to pierce the veil of secrecy in which cartels functions but also to get insider evidence of the cartel infringement. The leniency policy also has a very inhibiting effect on cartel formation and it discourages the operation of existing cartels as it creates distrust and suspicion among cartel members.

In order to get total **immunity** under the leniency policy, a participant company in a cartel must be the first one to inform the Commission of an unknown cartel by providing adequate information to prompt the Commission to conduct an inspection at the premises of the companies suspected to be involved in the cartel. If the Commission already possess sufficient information to carry out an inspection or has already undertaken one, the company must give proof that enables the Commission to establishment the cartel infringement. In all cases, the company shall also completely cooperate with the Commission throughout its

[6]Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, OECD Journal of Competition Law and Policy, Vol. 8, No-1, June 2006, OECD Publishing.

[7]6Mark Jephcott, *Horizontal Agreements and EU Competition Law*, Oxford University Press, New York, 2005, at p.4-5.

[8][2004], ECR I-123.

proceedings, furnish it with all proof in its possession and put an end to the infringement immediately. The cooperation with the Commission shows that the existence and the content of the application cannot be revealed to any other company. The company may not avail benefit from immunity if it took steps to force other undertakings to participate in the cartel.
The first applicant to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.The Commission considers that any statement submitted to it within the context of its leniency policy forms part of the Commission's file and may therefore not be disclosed or used for any other purpose than the Commission's own cartel proceedings[9]. Companies those are not eligible for immunity may benefit from decrease of fines if they furnish proof that shows "*significant added value*" to that already in the Commission's possession and have terminated their participation in the cartel. Evidence is considered to be of a "significant added value" for the Commission when it asserts its ability to prove the infringement.

Inception of Leniency

Leniency programmes are designed to give incentives to cartel members to come in, confess and aid the competition law enforcers. They aim to drive a wedge through the trust and mutual benefit at the heart of a cartel. They reward one, or a very few, whistleblowers with a large reduction in penalties (as compared to that calculated absent leniency), but not the other cartel members. In other words, they increase the attractiveness of whistle blowing, especially of being the first whistle-blower, as compared with continuing the cartel[10].
Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency. This is a definition, which has been used by the International Competition Network in its 2006 report on "Drafting and Implementing an Effective Leniency Program". In addition, agency decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. The term 'leniency', thus, could be used to refer to total immunity and 'lenient treatment', which means less than full immunity.
The terms 'immunity', 'leniency' and 'amnesty' are used in various jurisdictions to describe partial or total exoneration from penalties but are not synonymous in all jurisdictions. A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process[11].
A leniency programme is a system, publicly announced, of, "partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition law enforcement agency". The cartelist must self-report and fulfil certain other requirements. Typically, cartelists must confess, cease cartel activity, and fully cooperate in providing significant evidence to aid in the proceedings against the other cartel members. On its side, the competition law enforcer transparently and credibly commits to a predictable pattern of penalties designed to give cartelists incentives to apply for leniency. Crucially, the offer of full or very significant leniency is available only for the first applicant; if any penalty reduction is available for the second and third, it is not nearly as attractive[12].
Entry, external shocks, and change within the industry are the most common causes of cartel breakdown, According to their review of the empirical cartel literature, bargaining problems

[9]Supra Note 7
[10]9*Cartels And Competition: Anti Ethical Relationship,* (October 24, 2013) https://researchersclub.wordpress.com/.../cartels-and-competition-anti-ethical-relations,(lastacessedon September 25,2018)
[11]*Id*
[12]*Id*

were a more frequent cause of breakdown than cheating. The most successful cartels develop mechanisms to accommodate external changes, reducing the need to renegotiate. Cheating may, however, prevent some cartels from coalescing.
Competition law enforcement also figures in the list of causes of cartel breakdown. However, despite tougher sanctions in the past decade, their continued discovery indicates that cartels remain under-deterred[13].

Necessary conditions for an effective leniency programme include:
(a) Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do not apply for leniency;
(b) Penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;
(c) The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated;
(d) To attract international cartelists, the leniency programme protects information sufficiently for the applicant to be no more exposed than non applicants to proceedings elsewhere.
Leniency programmes target secret cartels. Because they are illegal and actively prosecuted in many economically important jurisdictions, members of cartels wish to keep them secret. Members limit, destroy, or camouflage evidence of the cartels' existence, operations or effects. A cartel member seeking leniency describes how the cartel operates, brings in and explains evidence to law enforcers, and perhaps testifies against the other members.
An effective leniency policy increases the expected penalty from cartelization. Although some cartelists receive a lower penalty, the resulting increase in the number of investigations means that more cartelists are punished. This more than compensates for the reduced fines imposed on those granted leniency. A higher expected penalty discourages cartels.
Leniency programme is a type of whistle-blower protection, i.e. an official system of offering lenient treatment to a cartel member who reports to the Commission about the cartel. The Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anticompetitive agreements and assist the competition authorities in lieu of immunity or lenient treatment. a Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own[14].

Leniency Policy in India
The Competition Commission of India (Lessen Penalty) Regulations, 2009 (the "Lesser Penalty Regulations") govern the procedure and extent to which leniencyby way of reduced penalties could be granted by the CCI to applicants who make vital disclosures[15]relating to cartel activity. An application is required to make to CCI, by an enterprise seeking leniency

[13]*Id*
[14]JOHN HANDOLL&YAMANVERMA**,** *Cartel leniency in India: overview,* (2018), <https://uk.practicallaw.thomsonreuters.com/2-520 7061?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>(last accessed on September 25, 2018).
[15]*ALLEN &OVERY,* Global Trends in Antitrust,(1st ed. 2013).

under the Lesser Penalty Regulations, which contains all material information evidence relating to the establishment or existence of a cartel.
The Lesser Penalty Regulations stipulate the following essential conditions that the CCI must take into account before granting reduced penalties.
1. The applicant should not have any further participation in the cartel unless the CCI direct otherwise,
2. The information provided should be a vital disclosure
3. The applicant should co-operate to the best of its ability to CCI inter alia by providing all relevant information, documents and evidences as required;
4. The applicant should co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI and
5. Relevant evidence should not be concealed, destroyed, manipulated or removed by the applicant. The reduction in penalties that may be awarded by CCI under the Lesser Penalty Regulations varies depending upon when the disclosure is made by the applicant.
The CCI can grant up to 100% reduction of penalty to the first applicant. The second applicant can also benefit from a reduction of penalty of up to or equal to 50%, upon making a disclosure of evidence already in possession of the CCI or the DG. The third applicant may be granted a reduction of penalty up to 30% of the full penalty leviable. However leniency may be granted only if the information is a vital disclosure, which enables the CCI to form a prima facie opinion in relation to the existence of a cartel, and the CCI did not have sufficient evidence to form such opinion at the time of making the application. Importantly, any information submitted under the Leniency Penalty Regulations should be treated as confidential (including in respect of the identity of the applicant) unless such information is already in public domain, or is required by law to be disclosed.

Procedure for grant of lesser penalty
(1) For the purpose of grant of lesser penalty, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule, or may contact, orally or through e-mail or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within three working days, put up the matter before the Commission for its consideration.
(2) The Commission shall thereupon mark the priority status of the applicant and the designated authority shall convey the same to the applicant either on telephone, or through e-mail or fax. If the information received under sub-regulation (1) is oral or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule within a period not exceeding fifteen days.
(3) The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.
(4) Where the application, along with the necessary documents, is not received within a period of fifteen days of the first contact or during the further period as may be extended by the Commission, the applicant may forfeit its claim for priority status and consequently for the benefit of grant of lesser penalty.
(5)The Commission, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the priority status of the application but merely on that basis, it shall not entitle the applicant for grant of lesser penalty.

(6) Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.
(7) Where the Commission is of the opinion that the applicant or its authorized representative, seeking the benefit of lesser penalty or priority status, has not provided full and true disclosure of the information and evidence as referred and described in the Schedule or as required by the Commission, from time to time, the Commission may take a decision after considering the facts and circumstances of the case for rejecting the application of the applicant, but before doing so the Commission shall provide an opportunity of hearing to such applicant.
(8) Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission and the procedure prescribed above, as in the case of first applicant, shall apply mutatis mutandis.
(9) The decision of the Commission of granting or rejecting the application for lesser penalty shall be communicated to the applicant."The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 amending the existing Competition Commission of India (Lesser Penalty) Regulations, 2009 ("Leniency Regulations"), in keeping pace with some of the best practices in other jurisdictions.
The amendments are largely in line with the draft amendments issued in March 2017 indicating that the CCI is now taking initiatives to streamline the procedures for applying for leniency on the basis of its experience in some ongoing matters.

Leniency Regulations in India

We now look at the Indian experience in investigating and punishing cartels. This facilitates comparisons with other countries and provides a road map for future progress. The MRTP Act has its genesis in the Directive Principle of State Policy (Articles 38 and 39), embodied in the Constitution of India.
It was enacted to:
• prevent concentration of economic power to the common detriment;
• provide for control of monopolies;
• prohibit monopolistic and restrictive trade practices, and
• prohibit unfair trade practices[16].
The MRTP Act empowered the Central Government to set up an authority, called the MRTPC, which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on suo-moto basis. The DGIR used to report directly to the Ministry of Corporate Affairs and not the MRTPC Commission. However, as per the Competition Act, the DG (IR) would report directly to the Commission.
Complaints regarding restrictive trade practices from affected parties have to be referred to the DG (IR) for conducting preliminary investigation as per section 11 and 36C of the MRTP Act. The DG (IR), after completion of the preliminary investigation and as a result of its findings, submits an application to the MRTPC for an enquiry. Restrictive trade practices are generally those practices that have an effect on prevention, distortion and restriction of competition. For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which

[16]*Study of Cartel Case Laws in Select Jurisdictions –Learnings for the Competition Commission of India,* <http://www.cci.gov.in/node/444> (last accessed on September 25, 2018)

may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice[17].

One example of a RTP is a cartel. As held in *Union of India & Others vs. Hindustan Development Corporation*, "a cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". Under the MRTP Act, a cartel is categorised as an RTP, which has been defined as "a trade practice which has or may have the effect of preventing, distorting or restricting competition" (Section 2(o) of the MRTP Act)[18].

Various categories of agreements enumerated under section 33(1) of the MRTP Act, including agreements, which restrict persons from whom certain goods can be purchased, have been recognised as per se restrictive. Cartels, fall under clause (d) of the section, which states that "any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers, shall be deemed for the purpose of this Act, to be an agreement relating to restrictive trade practices and shall be subjected to registration as under Section 35 of the MRTP Act". However, suchagreements are not per se void or illegal. The MRTPC would still require undertaking an enquiry under Section 37 of the MRTP Act, as to whether the agreements are prejudicial to public interest or not. Until the time that the MRTPC declares the agreement as prejudicial to public interest, the parties may continue to conduct trade and business as usual.

However, there have been cases in the past where the MRTPC as per section 12B have awarded compensation, but it failed to do so in cartel cases. For example:

1. *Kiroloskar Oil Engines Ltd. vs. MRTPC*, [JT2002 (10) SC53 – MRTPC] ordered the appellant to pay compensation for indulging in Restrictive Trade Practice. But as the necessary ingredients for establishing indulgence of restrictive trade practice have not been found, the order could not be sustained.
2. *Pennwalt (I) Ltd. & Another vs. MRTPC*, [AIR1999Delhi23] – The respondent filed an application u/s 12B of the MRTP Act for compensation of Rs 110.48 lakhs for supplying defective machinery which led to unfair trade practice. The MRTPC filed a show cause notice on receipt of the application. The petitioner challenged the notice. The petition was rejected[19].
3. *R.C. Sood& Co. (P) Ltd. Vs. MRTPC*, [1996(38)DRJ118] – Petitioners by way of writ petition challenged the notice issued against the application of second respondent under section 12B of MRTP Act, claiming compensation for loses caused as a result of unfair trade practice. The petition was rejected and it was held that it is not necessary that MRTPC should inquire first or investigate into the allegations before issuing notice u/s 12B of the MRTP Act.

Major Legislations Regulating Leniency Policy In India: Competition Commission Of India (Lesser Penalty) Regulations 2009

Section 3 the Competition Act, 2002 deals with anti-competitive agreements. Sec. 27(b) of the Act provides where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Sec. 3 or Sec. 4 (deals with abuse of dominant position), as the case may be, it may impose such penalty, as it may deem fit which shall be not less than 10% of the average of the turn over for the last three preceding financial years, upon such person or enterprises which are parties to such agreement or abuse. In case any agreement referred to in Section 3of the Act has been entered into by any cartel, the Commission shall impose upon such producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three

[17] *Id*
[18] *Id*
[19] *Id*

times of the amount of profits made out of such agreement by the cartel or 10% of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher.

Lesser Penalty

Sec. 46 of the Act provides for lesser penalty. It provides that the Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, hasmade a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the Rules or the regulations.

The lesser penalty shall not be imposed by the Commission in cases where proceedings for the violation of any of the provisions of this Act or the rules or the Regulations have been instituted or any investigation has been directed to be made under Sec. 26 before making such disclosure. The lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who first made the full, true and vital disclosures under this section. The Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings not complied with the condition on which the lesser penalty was imposed by the Commission; or had given false evidence; or the disclosure made is not vital and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person have been liable, had lesser penalty not been imposed.

Lesser Penalty Regulations: An Overview

Section 46 of the Indian Competition Act, 2002 (Act) and the Lesser Penalty Regulations give the Competition Commission of India (CCI) the power to impose lesser penalties on an entity that: (a) makes a 'vital disclosure' by submitting evidence of a cartel; or, (b) in the case of subsequent leniency applicants, provides 'significant added value'to the evidence already in possession of the CCI.

Further, the leniency regime previously recognised the provision of 'markers' toonly three leniency applicants, in the order of priority. The first leniency applicant could receive up to 100% immunity from penalty, the second leniency applicant up to 50% reduction in penalty and the third leniency applicant up to 30% reduction in penalty. The CCI, *in Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans* (Suo Moto Case No. 03 of 2013), published its first leniency decision granting a 75% reduction in penalty to a leniency applicant who came forward after the CCI commenced investigation of the anti-competitive conduct.

Lesser Penalty Regulations: Amendments

1. No Limitation on Number of Markers: The Amended Lesser Penalty Regulations recognize markers beyond the first three markers, i.e., now more than three applicants can apply for leniency. Such subsequent applicants (after the third applicant), will also be eligible for reduction in penalties of up to 30% now, provided they assist in giving 'significant added value' to the evidence already in the possession of the CCI. Since there is no longer a cap on the number of leniency applicants, this amendment provides a clear incentive for more cartel participants to come forward and disclose the existence of a cartel. It also brings the Indian leniency regime in line with the leniency regime in the United States of America and is a step in the right direction.
2. Access to File: In a significant move, the Amended Lesser Penalty Regulations allow access to the file to not only leniency applicants but also non-leniency applicants, including third parties who have been impleaded in leniency proceedings. Third

parties, who are not parties to the proceedings, have not been granted the right of access to file.

The amendment grants those who have the right of access to file, the right to obtain copies of the non-confidential version of the evidence and information submitted by leniency applicants, after the Director General's investigation report(DG Report) has been forwarded to parties. This effectively addresses the single largest complaint under the earlier Indian leniency regime (of non-access to any information filed by leniency applicants), which had resulted in several non-leniency applicants approaching High Courts by way of writs, to gain access to information provided by a leniency applicant. It also balances the confidentiality requirements under a leniency regime, while addressing the rights of defence for non-leniency applicants and is in line with the approach adopted by the European Commission.

3. Application for 100% lesser penalty to be considered even if already granted to another applicant: The earlier proviso to Regulation 4 of the Lesser Penalty Regulations, which stated that an application for reduction in penalty of up to 100% will only be available to one applicant has been deleted under the amended regulations. Therefore, it is possible that the benefit of the first marker or reduction in penalty of up to 100% may be granted to more than one applicant. However, in our view, the circumstances under which this may be granted are likely to be rare.
4. Key Takeaways: The Amended Lesser Penalty Regulations are a clear signal of the CCI's intent to actively encourage the use of the leniency regime, while ensuring that leniency orders are not set aside on grounds of due process violations. The CCI has struck a fine balance between incentivising individuals and enterprises to come forward with information pertaining to the existence of cartels, by removing caps on the number of leniency applicants and ensuring non-leniency applicants have access to the file to be able to effectively defend them. While the Amended Lesser Penalty Regulations are a welcome move, the CCI ought to have addressed a key industry concern relating to the discretion in granting reduction of penalty. The Amended Lesser Penalty Regulations continue to state that a leniency applicant 'may be' granted a reduction in penalty. The use of the word "shall" have made the grant of reduction mandatory and would have provided certainty to the leniency regime, to help bolster the CCI's mandate regarding cartel enforcement[20].

   Individuals to benefit from leniency: Prior to the Notification, the Leniency Regulations were restricted in its application to enterprises alone. The Leniency Regulations now stand amended to allow individuals involved in the alleged cartel to seek a reduction in penalty as well. To this end, the leniency application is required to specify the names of such individuals at the time of submission to the CCI. This is a welcome move to encourage enterprises as well as individuals to come forward and provide information on cartel arrangements.

   No limitation on number of markers: Prior to the Notification, the Leniency Regulations allowed reduction in penalty to a maximum of three leniency applicants on a first-come-first-served basis, coupled with the quality of information/evidence submitted and other factors. The Notification has done away with this limitation by allowing additional applicants to avail of the benefits of the leniency programme. Presently, while the first applicant may still be granted up to 100% reduction in penalty and the second applicant up to 50%, the third applicant or any subsequent applicants may be granted up to 30% reduction in penalty. This amendment is significant considering that often enterprises/individuals shied away from conceding

[20] *Id*

to their involvement in cartels due to the risk of submitting self-incriminating evidence without being certain as to whether they will eventually rank within the first three markers and consequently, be able to receive reduction in penalty. With the introduction of this amendment, not only will more enterprises/individuals be encouraged to disclose evidence on their respective collusive conduct but also will enable the CCI to actively bust cartels in the future[21].

Background to the private damages litigation in India

Before diving into the details of the *NSE case*[22], by way of back- ground, theprivate damages regime is largely encased within Chapters VI and VIII-A of theAct. Post the recent amendment to the law, where the powers of the Competition Appellate Tribunal (COMPAT) stand transferred to the National Company Law Appellate Tribunal (NCLAT), the NCLAT now has original jurisdiction to hear applications from the Central or State Government or any person or enterprise who has suffered any loss or damage as a result of any contravention of Sections 3, 4, 5 and 6 of the Act, which has been established as a violation by the CCI or the COMPAT.

The private litigation regime makes it mandatory that any claim can only arise after a finding of the violation of the substantive provisions of the Act has been established by the regulator or the appellate authority. Additionally, the enactment also provides for a application to be filed against enterprises when any damage is suffered by the applicant as a con- sequence of the enterprise violating any order or direction of the CCI or the appellate authority for seeking compensation[23].

The Act, as drafted and amended, is significantly forward looking and provides for remedial actions, such as class action suits, which are at par with global best practices. In a situation where a group of persons have the same claim against the defaulter of the substantive provisions of the Act, a class action suit can be instituted to seek remedy. Although the Act allows one or more persons to file the application on behalf of all interested parties, this is subject to the Civil Procedure Code, 1908.

On the procedural front, though the Act does not stipulate the time period within which an application is to be filed for private compensation, guidance may be sought from the erstwhile monopolies and restrictive trade practices (MRTP) cases. In *Director General (Investigation and Registration)* v. *Thermax (P)Ltd***.** and *M.S. Shoes East Ltd.* v. *Indian Bank*, the MRTP Commission referred to the Supreme Court case of *Corporation Bank* v. *Navin J. Shah*, which lays down the "doctrine of laches" i.e., if a claim is to be made, the same must be done within a reasonable time period. Although the scope of "reasonable time" is amatter of factual consideration, in the above- mentioned precedents of the MRTP, the private compensation claims were rejected since they were brought after a delay of more than 5 years.

Recommendations

In India, the cartels have mainly flourished because there was no adequate vigilance mechanism till the CCI was established and ordered to go after and investigate such cartels. It made a remarkable decision to introduce leniency program after the "*Cement Cartel Case*"

[21]*Supra* Note 16

[22]MCX-SX vs.NSE case no.13/2009 https://www.cci.gov.in accessed on September 25,2018

[23]The Competition Commission of India (Lesser Penalty) Amendment Regulations, (2017) (No.1 of 2017), amending the existing Competition Commission of India (Lesser Penalty) Regulations, 2009 ("Leniency Regulations"), Reg. 2

was unearthed and 11 cement companieswere imposed an exemplary fine amount of Rs. 6307crores. Till now, the CCI has decided upon and passed orders in more than 237 cases imposing a total penalty of more than Rs. 9,500crores in 22 cases. Unfortunately, even after proposing and rolling out Lesser Penalty Provisions in 2009, CCI has not been effective enough in implementing these leniency program. Set out below are the lessons learnt from various jurisdictions:

i. **Need for Proper Marker System in India**: With more than one member forming cartel, there can be situation where there are applications coming from cartel members at the same time that have constituted a single cartel. This results in a lot of confusion as to the order of the queue. This order is of utmost consequence as it plays a crucial role in determining the lessening of fine amount or penalty. There is a lack of transparency and questions might be raised on the basis of which a cartel member was preferred above the other. Thus, the marker system was introduced to save and protect the cartel member's place in a leniencyqueue for a definite period of time[24].This was enforced to take care of such issues. This was also announced to enhance the efficacy and provide flaccidity to the procedure and motivating quick reporting of cartel activities. The marker system introduces an additional incentive also to disclose the information. So, one of the main reasons for the poor effectiveness of leniency program in India is the lacks of well-defined marker system. Even though, the Indian regime specifies that an applicant shall be 'marked' after making an application before theCommission either in writing (which includes e-mails, fax etc) or orally[25], however, due to the non-existence of a concrete marker system, where a leniency applicant shall be approved a marker only subjected to furnishing relevant information so as to make a remarkable change or initiation in the proceedings against the cartel, such remains unclear.

ii. **Introduction of Confidentiality Clause in the System:** The second major concern is preservation and maintenance of confidentiality and secrecy of the people after they produce the first hand information. The first leniency applicant, *Phoenix Conveyer Belt*, India came forth and revealed the formation of cartel in conveyor belt segment is evidence that the CCI has failed to ensure the adequate amount of secrecy that should generally be given to such leniency applicants.

Conclusion

The purpose of antitrust laws is not only to deter practices that have an adverse effect on competition, but also to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade. This is truly reflective of the changing economic conditions. Therefore, adequate care and safety must be taken to ensure that the measures taken against anticompetitive practices do not go to the extent of interfering with the freedom of the traders and business people. A cooperative spirit should be adopted to protect the interests of the producers, the traders and the consumers. That way would truly promote the larger public interest.

The law should encompass within its purview all the consumers who purchase goods or services irrespective of the objective for which the purchase is made. The competition law should be designed and enforced in terms of a dynamic competition policy of the state. Unfortunately, the anti-cartel enforcement activity of the CCI has been wanting, largely as

[24] http://ec.europa.eu/competition/international/multilateral/2014_dec_leniency_programs_en.pdf; last accessed on 27 September 2018.

[25] 44 Lesser Penalty Regulations 2009

the result of the collection of inadequate evidence. In order to assure an effective anti-cartel regime, it is necessary to have a strong and robust leniency programme.

Securities Fraud- Issues and challenges for Regulators in India

Dr.Kondaiah Jonnalagadda*

Securities Frauds are so powerful in the present globalized world, where we live in borderless and 24x7 business worlds. The need of the present world seems to be gain instant/quick money in investing stock market. Majority of Middle class person are the major victims of securities/corporate fraud. SEBI was established to protect the interest of investors. In the recent times supreme court rejected the argument of respondents in the case of *SEBI vs. Pan Asia Advisors Ltd and Ors*,[26] that SEBI should keep its mouth shut on the ground that it cannot extend its long statutory arm beyond Indian territory to control any such misdeeds deliberately committed with a view to defraud the India investors and thereby their interest in the investments of securities and its protection is at great stake."The Court further held that Regulatory bodies should not keep calm on the ground of absence of provisions of law; it was held that role of regulatory body is to protect the interest of Investors and protection of markets is primary motto. Protection of 'Retail Individual Investors' (RII) , also a get fairly good chance to purchase shares of newly floated companies or shares of existing companies, as and when they are offered to the public at large. SEBI should take additional steps to prevent manipulative practices for protection of RIIs.[27]

In the present paper, author has attempted to analyze the legal framework of securities law to deal with securities fraud, contemporary issues and try to analyze the challenges before regulatory bodies to deal with issues relating to corporate and securities fraud.

Securities:

In general commercial law context, shares and debentures are used inter-changeably for securities. According to Art.366 (26) constitution of India, Securities include stock. Section 2(81) of Companies Act 2013 provides that "securities" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);. Securities defined under Securities Contract Act, 1956 in Section 2(h) as follows:

> (h) 'securities' include-
>
> > (i) shares, scrips stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
> >
> > [28][(ia) derivative[29];

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[26] Manu/SC.0761/2015, para 81

[27] SEBI vs. M/sOpee Stock-Link Ltd & Others , (civil Appeal no.2252 of 2010) judgment dt.July 11,2016, para 2

[28] Inserted by Act 31 of 1999, s.2(w.e.f. 22-2-2000)

[29] 'Derivatives are time bombs and financial weapons of mass destruction'[29] said Warren Buffett, one of the world's greatest investors, who overtook Microsoft Maestro in 2008 to become the richest man in the world and who is known as the 'Sage of Omaha or Oracle of Omaha'. (i) The bankruptcy of Orange County, CA in 1994, the largest municipal bankruptcy in U.S. history. On December 6, 1994, Orange County declared Chapter 9 bankruptcy, after losing about $1.6 billion through derivatives known as "reverse floaters" whose values move inversely with market interest rates. (ii) The collapse of the 233 year old Barings Bank when Nick Leeson, a

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes]

[30][(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;]

[31][(id) units or any other such instrument issued to the investors under any mutual fund scheme;]

[32][Explanation.-- For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938(4 of 1938).]

[33][(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receiveable including mortgage debt, as the case may be;]

[34](ii) Government securities;

(iia) Such other instruments as may be declared by the Central Government to be securities and

(iii) rights or interests in securities[35];

Hybrid Instrument:

"Hybrid" means any security which has the character of more than one type of security, including their derivatives.Hybrid securities, therefore, generally means securities, which have some of the attributes of both debt securities and equity securities, means a security which, in the term of a debenture, encompassing the element of indebtness and element of equity stock as well. The scope of the definition of Section 2(h) of SCR Act came up for consideration before this Court in *SudhirShantilal Mehta v. Central Bureau of Investigation*[36] and the Court stated that the definition of securities under the SCR Act is an inclusive definition and not exhaustive.

The Court held that it takes within its purview not only the matters specified therein, but also all other types of securities, thus it should be given an expansive meaning. In *Naresh*

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trader at Barings Bank, made poor and unauthorized investments in index futures. iii) The crumbling of the heavy-into-hedges trading firm known as 'Long Term Capital Management' under the weight of derivatives worth $ 1.4 trillion, in 1998. (v) The collapse of the largest investment Bank Lehman Brothers and the leading American insurer AIG, due to extensive exposure to Credit Default Swaps (CDS). and creating a global economic crisis.

[30] Inserted by Act 54 of 2002, s.41 and Sch ,(w.e.f. 21-6-2002)
[31] Inserted by Act 1 of 2005, s.2 (w.r.e.f.12.10.2004)
[32] Inserted by the Securities and Insurance Laws(Amendment and Validation) Act,2010(26 of2010), s.4(w.r.e.f.9.4.2010)
[33] Inserted by Act 27 of 2007, s.2 (w.e.f. 28-5-2007)
[34] Substituted by Act 15 of 1992, s,33 and Sch., for sub-Cl.(ii) (w.r.e.f 30-01-1992)
[35] GDRs and ADRs are best examples
[36] MANU/SC/1415/2009 : (2009) 8 SCC 1

K. Aggarwala and Company v. Canbank Financial Services Limited and Anr.[37] while referring to the definition of the term "securities" defined under SCR Act and the applicability of a Circular issued by the Delhi Stock Exchange, the Court endorsed the view of the Special Court and noted that the perusal of the above quoted definition showed that they did not make any distinction between listed securities and unlisted securities and, therefore, it was clear that the circular would apply to the securities which were not listed on the stock exchange.

OFCDs issued have the characteristics of shares and debentures and fall within the definition of Section 2(h) of SCR Act[38], which continue to remain debentures till they are converted. The terms "Securities" defined in the Companies Act has the same meaning as defined in the SCR Act, which would also cover the species of "hybrid" defined Under Section 2(19A) of the Companies Act. Since the definition of "securities" Under Section 2(45AA) of the Companies Act includes "hybrids", SEBI has jurisdiction over hybrids like OFCDs issued by Saharas, since the expression "securities" has been specifically dealt with Under Section 55A of the Companies Act,1956[39]. Section 2(h) of the SCR Act gives emphasis to the words "other marketable securities of a like nature", which gives a clear indication of the marketability of the securities and gives an expansive meaning to the word securities. Any security which is capable of being freely transferrable is marketable. The definition clause in Section 2(h) of SCR Act is a wide definition, an inclusive one, which takes in hybrid also..

Kinds of Share Capital

The share capital of a company limited by shares shall be of two kinds[40], namely:--

(a) equity share capital--

(i) with voting rights; or

(ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

(b) preference share capital:

Provided that nothing contained in this Act shall affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

Explanation.--For the purposes of this section,--

(i) "equity share capital", with reference to any company limited by shares, means all share capital which is not preference share capital;

(ii) "preference share capital", with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to--

[37] MANU/SC/0324/2010 : (2010) 6 SCC 178,
[38] Sahara case
[39] ibid
[40] **Section 43,** Companies Act,2013

(a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and

(b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;

(iii) capital shall be deemed to be preference capital, notwithstanding that it is entitled to either or both of the following rights, namely:--

Equity and preference share capital, debentures are few of the securities more prevalent in the securities s market. The other types of securities are also more important financial instruments in the financial law.

Issue of securities and Role of SEBI:

Chapter III of the Companies Act, 2013 deals with prospectus and allotment of securities. Part I of chapter III further explains about Public offer and private placement.[41] Public companies can raise capital through public and private placement, where as Private Companies raise capital through private placement. Under same chapter SEBI is given powers to regulate and issue of securities.[42] SEBI is given powers under section 11,11A, 11B and 11D of the SEBI act to regulate the securities market and protect the interest of investors. On the perusal of section 34, 35 and 36 , it can be said the persons involved in various activities to defraud investors will be punished for fraud as per Section 447.

The above definition is inclusive and also provides various types of financial instruments in the category. It also includes both equity and debt capital instruments and hybrid instruments also. The two exclusive legislations that governed the securities market till early 1992 were the Capital Issues (Control) Act, 1947 (CICA) and the Securities Contracts (Regulation) Act, 1956 (SCRA). Bombay Securities Contracts Control Act was enacted in 1925. This was, however, deficient in many respects. Under the constitution which came into force on January 26, 1950, stock exchanges and forward markets came under the exclusive authority of the Central Government.

SEBI Act is a special law, a complete code in itself containing elaborate provisions to protect interests of the investors. Section 32 of the Act says that the provisions of that Act shall be in addition to and not in derogation of the provisions of any other law. SEBI Act is a special Act dealing with specific subject, which has to be read in harmony with the provisions of the Companies Act, 2013.

Powers and functions of SEBI

In Chapter IV of the SEBI Act, Section 11 states that, subject to the provisions of the Act, it shall be the duty of SEBI to protect the interests of investors in securities and to promote the development of and to regulate the securities market. SEBI is also duty bound to prohibit fraudulent and unfair trade practices relating to securities markets, prohibiting insider trading in securities etc. Section 11A authorizes SEBI to regulate or prohibit issue

[41] Section 23 of Companies Act,2013
[42] Section 24

of prospectus, offer document or advertisement soliciting money for issue of securities which read as follows:

Some of the Functions of Board[43] are:

(a) regulating the business in stock exchanges and any other securities markets;

(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;

(ba) registering and regulating the working of the[2][depositories, participants, custodians] of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification specify in this behalf;]

(c) registering and regulating the working of[3][venture capital funds and collective investment schemes], including mutual funds;

(d) promoting and regulating self-regulatory organisations;

(e) prohibiting fraudulent and unfair trade practices relating to securities markets;

(f) promoting investors' education and training of intermediaries of securities markets;

(g) prohibiting insider trading in securities;

(h) regulating substantial acquisition of shares and take-over of companies;

Securities law amendment act, 2014 inserted new provisions on in Section 11 (i) (2) where by vesting more power to regulators like SEBI. To mention few power are, sebi can call for information from , or furnishing information, or other authorities, whether in india or outside india , having functions similar to those of Board, in the matters relating to prevention or detention of violations in respect of securities laws. In additions to this, SEBI may enter into an arrangement or agreement or understanding with such authority with the prior permission of the Central Government. [44]

Fraud under the Companies Act, 2013:

Companies Act, 2013(the Act), has dealt elaborately on the aspects of fraud related to corporate matters. Fraud means [45](i) "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss; In addition to this the fraud is also referred in various other chapters in the Companies Act, to name few:

a. Section 447 - Punishment for Fraud

[43] See Section 11
[44] See. Securities Law (Amendment) Act, 2014, section 11
[45] See Section 447, Explanation (i)

b. Section 7 - Incorporation of company
c. Section 34 - Criminal liability for mis-statements in prospectus
d. Section 140 - Removal, resignation of auditor and giving of special notice
e. Section 141 - Eligibility, qualifications and disqualifications of auditors
f. Section 147- Punishment for Auditors- contravention
g. Section 199- Fraud- Recovery of Remuneration in certain cases
h. Section 271- winding up
i. Section 278 and 300

It is submitted that, the present Act is covered aspects of fraud in different chapters and also provides stringent punishment under fraud.

Merger of FMC with SEBI

On September 2015[46], Forward Market commission merged with SEBI and also repealed the Forward Contracts Regulation Act (FCRA) . SCRA is a stronger law, gives more powers to SEBI than the FCRA under SEBI. The merger improves the confidence on the markets and also improves integrity among regulators. SEBI has a far superior surveillance, risk-monitoring and enforcement mechanisim and the market participants say will give more confidence to investors and may help business grow.

The NSEL episode underlined the need for better and stronger regulator to safeguard investor interest and restore confidence. The merger the two regulators had been recommended by various committees including FSLRC to gain economics of sale and scope and make the regulation of commodities market more effective.

Judicial Approach and Securities Market

In recent times, there are scams that shacked the Indian stock markets[47]. These scams paved the way to change the judicial approach to prevent securities fraud/markets.

In N.Narayanan v. Adjudicating Officer, SEBI[48], was a case decided by supreme court on where in Appellant was the promoter as well as WTD of M/s Pyramid Saimira Theatre Limited (PSTL), a company registered under the companies act, 1956 and listed in BSE and NSE at the relevant time. The company was involved in the business of Exhibition(Theatre), film an Television, content production, distribution, Hospitality, Food and Beverage, Animation and Gaming and Cine Advertising. Etc. the department of SEBI noticed that the company had committed serious irrelegularities into books of accounts and showed inflated profits and revenues in the financial statements and lured the general public to invest in the shares of the company based on such false financial statements thereby violated the provisions of SEBI(prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulation, 2003. [49]. In this case, court observed that' 'market abuse' has now become a common practice in the India' security market and , if not properly curbed, the same would result in defeating the very object and purpose of SEBI Act which is intended to

[46] See PR No. 237/2015,

[47] Harshad Mehta scam - Rs 4,000 crore – Conviction - sentenced 5 years rigorous imprisonment and a fine of 25000. CRB Scam - Rs 1,200 crore - Bhansali spent three months in jail in 1997. He is out now but nobody knows where he lives and if they do, they are not snitching.; Ketan Parekh Scam - Rs 800 crore - Conviction - 1 year sentence. Satyam Scam - Rs 14,162 crore – case is going on; Sahara Housing Bonds - Rs 24,029 crore - case is going on; Speak Asia - Rs 2,200 crore - investigation is going on; Saradha Scam - Rs 10,000 crore – investigation is going on; NSEL Scam - Rs 5,600 crore - investigation is going on; PACL Scam; PGF Ltd

[48] Manu/SC/0426/2013

[49] Ibid para 3

protect the interest of investors in securities and to promote the development of securities market. [50]

SEBI Act read with regulations of the companies act would indicate that the obligation of directors in listed companies. Prevention of market abuse and preservation of market integrity is the hallmark of securities law.[51]

SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Print and Electronic Media have also a solemn duty not to mislead the public, who are present and prospective investors, in their forecast on the securities market. of course, genuine and honest opinion on market position of a company has to be welcomed.

PACL Ltd. (PACL CASE)

PACL Ltd., (PACL) had claimed to have raised/mobilized liability aggregating to Rs.49000Crore(approx.) from various Collective Investment Schemes (CIS). SEBI vide Order dated August 22, 2014 held that schemes of PACL are in the nature of CIS and inter alia directed to return the monies collected with returns which are due to its ustomersas per terms of the offer within a period of three months. PACL its promoter/directors appealed to the Hon'ble Securities Appellate Tribunal (SAT), which dismissed their appeals and upheld the order of SEBI. Being aggrieved of the order dated August 14, 2015, appeals have been preferred before the Hon'ble Supreme Court impugning the orders of SAT. The Hon'ble Supreme Court vide its Order dated February 02, 2016, in the matter of PACL Ltd. Vs Securities and Exchange Board of India (Civil Appeal No. 13394/2015) and other connected matters was pleased to constitute a committee under the chairmanship of Hon'ble Mr. Justice (Retd.) R. M.Lodha (Former Chief Justice of India) empowering the committee to take possession of the title deeds of PACL, sale the properties to return the customers of PACL. 4. Accordingly, the Committee is in the process of collecting properties documents of PACL from CBI to initiate the process of disposing of properties to refund to the customer of PACL who have invested in various schemes of PACL Ltd., after verification of their genuineness. Meanwhile, customers of PACL has been informed and advised through public notice; (i) Not to part with and /or share records/ documents of their investments in the schemes of PACL Ltd. with PACL Ltd. or any other person, till further intimation in this regard by the Committee; and (ii) Not to make any new investment or any payment towards installments or otherwise to PACL Ltd. or its officers/ agents etc.[52]

PACL instance is a big scam that is pending before regulating and judicial bodies in India. The investors have to for long time to get back return to their investments. It is clear from the notice available from SEBI that the investors are asked to wait for further notification. How long this time takes the way forward is bleak.

Collective Investment Scheme

[50] Ibid para 10
[51] Ibid para 35
[52] http://www.sebi.gov.in/cms/sebi_data/attachdocs/1459154300548.pdf

A Collective investment scheme is any scheme or arrangement, which satisfies the conditions, referred to in sub-section (2) of section 11AA of the SEBI Act.

11AA. Collective investment scheme

(1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any company under which,-

(i) the contributions, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement.[53]

[54][(2) In these regulations the expression 'collective investment scheme' shall have the same meaning as assigned to it under section 11AA of the Act.]

The question of validity of Collective Investment Schemes came before Supreme Court in *P.G.F. Limited and Ors.Vs. Union of India (UOI) and Anr*.[55] The Appellant, known as Pearls Green Forests Limited and called PGF Limited from 1997, is having its registered office at S.C.O. No. 1042-43, Sector 22-B, Chandigarh and its Head Office at 2nd Floor, Vaishali Building, Community Centre, PaschimVihar, New Delhi. Though the Memorandum and Articles of Association of the Company provide for carrying on very many activities by way of business operations, namely, sale of agricultural land, sale and development of agricultural land and joint venture schemes. of the above three operations, when the writ petition was heard by the Division Bench of the High Court it was reported on 28.05.2004 by the learned Counsel for the Appellants that the PGF Limited took a

[53] See also (3) Notwithstanding anything contained in sub-section (2), any scheme or arrangement-

(i) made or offered by a co-operative society registered under the Cooperative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State; (ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-1 of the Reserve Bank of India Act, 1934 (2 of 1934); (iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;(iv) providing for any scheme, pension scheme or the insurance scheme framed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952);(v) under which deposits are accepted under section 58A of the Companies Act, 1956 (1 of 1956);(vi) under which deposits are accepted by a company declared as a Nidhi or a Mutual Benefit Society under section 620A of the Companies Act, 1956 (1 of 1956);(vii) falling within the meaning of chit business as defined in clause (e) of section 2 of the Chit Funds Act, 1982 (40 of 1982);(viii) under which contributions made are in the nature of subscription to a mutual fund,shall not be collective investment scheme.]

[54] Substituted by the SEBI (Collective Investment Schemes) (Amendment) Regulations, 2000, w.e.f. 14-2-2000.

[55]AIR2013SC3702, [2013]113CLA526(SC), [2013]179CompCas352(SC

decision to disband all its schemes, other than its operations relating to the business connected with sale of agricultural land and/or sale and development of agricultural land. Based on the said representation, an interim order came to be passed by the Division Bench on 28.05.2004 with which we are also not seriously concerned.

There was a public notice issued by the second Respondent herein on 18.12.1997, apart from specific letter addressed by the second Respondent to the PGF Limited dated 20.04.1998, by which the PGF Limited was called upon to furnish various details as regards to the Collective Investment Schemes, within 15 days of the issuance of its letter dated 20.04.1998. The second Respondent also stated to have issued further communication based on the order of the Delhi High Court in CWP No. 3352/1998 dated 7th and 13th October 1998, wherein all plantation companies, agro companies and companies running collective investment schemes, to get themselves credit rated from credit rating companies approved by the second Respondent. The PGF Limited was directed to comply with the said directions also.

Recently many companies especially plantation companies have been raising capital from investors through schemes which are in the form of collective investment schemes. However, there is not an adequate regulatory framework to allow an orderly development of this market. In order that the interests of investors are protected, it has been decided that the Securities and Exchange Board of India would frame Regulations with regard to collective investment schemes. It is, therefore, proposed to amend the definition of "securities" so as to include within its ambit the derivatives and the units or any other instrument issued by any collective investment scheme to the investors in such schemes.[56]

Therefore, the paramount object of the Parliament in enacting the SEBI Act itself and in particular the addition of Section 11AA was with a view to protect the gullible investors most of whom are poor and uneducated or retired personnel or those who belong to middle income group and who seek to invest their hard earned retirement benefits or savings in such schemes with a view to earn some sustained benefits or with the fond hope that such investment will get appreciated in course of time. Certain other Section of the people who are worstly affected are those who belong to the middle income group who again make such investments in order to earn some extra financial benefits and thereby improve their standard of living and on very many occasions to cater to the need of the educational career of their children[57].

It will have to be stated with particular reference to the activity, of the PGF Limited, namely, sale and development of agricultural land as a collective investment scheme, the implication of Section 11AA was not intended to affect the development of agricultural land or any other operation connected therewith or put any spokes in such sale-cum-development of such agricultural land.

In this context, Supreme Court also take judicial notice of the fact that those schemes, which would fall under Sub-section (2) of Section 11AA would consist of a marketing strategy adopted by those promoters, by reason of which, the common man who is eager to make an investment falls an easy prey by the sweet coated words and attractive persuasions of such marketing experts who ensure that those who succumb to such persuasions never care to examine the hidden pitfalls under the scheme, which are totally against the interests of the investors, apart from various other stipulations, which would ultimately deprive the investors of their entire entitlement, including their investments. The

[56] Ibid para 36
[57] Ibid Para 37

investors virtually by signing on the dotted lines of those stereotyped blank documents would never be aware of the nature of constraints created in the documents, which would virtually wipe out whatever investment made by them in course of time and ultimately having regard to the legal entangles in which such investors would have to undergo by spending further monies on litigations, ultimately prefer to ignore their investments cursing themselves of their fate. More than 90 per cent of such investors would rather prefer to forget such investments than making any attempt to secure their money back. Thereby, the promoters put to unlawful gain who always thrive on other peoples money.

Therefore, in reality what Sub-section (2) of Section 11AA intends to achieve is only to safeguard the interest of the investors whenever any scheme or arrangement is announced by such promoters by making a thorough study of such schemes and arrangements before registering such schemes with the SEBI and also later on monitor such schemes and arrangements in order to ensure proper statutory control over such promoters and whatever investment made by any individual is provided necessary protection for their investments in the event of such schemes or arrangements either being successfully operated upon or by any mis-fortune happen to be abandoned, where again there would be sufficient safeguards made for an assured refund of investments made, if not in full, at least a part of it.

Supreme Court held that[58]Section 11AA of the SEBI Act is constitutionally valid. Further held that the activity of the PGF Limited, namely, the sale and development of agricultural land squarely falls within the definition of collective investment scheme Under Section 2(ba) read along with Section 11AA (ii) of the SEBI Act.

Contemporary Challenges before Regulatory Bodies:

Presently, we have different types of securities scams before regulatory/adjudicatory bodies to deal with the frauds like a. National Herald Case(liability of directors/fiduciary) b. Kingfishers Airlines(NPA/Banking/securities) c. Sports/securities law d. Aircel- Maxis(Money laundering/takeover, e. PACL (Collective investment Scheme). It is pertinent to note that the natures of these frauds involve complex issues and also more than one regulatory body is involved in corporate scams. SEBI is given powers on prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control. [59]The development and technology paved the way for the acceleration of securities fraud in securities market. Regulatory body lacks the with proper enforcement of regulations.

Conclusion:

In conclusion, it is submitted that in the light of Sahara, Satyam, Sharada and PACL scams which are presently pending at various adjuratory bodies, we can image the impact of the scams. Instances we can witness that the from time to time we found that the investors are deceived by the corporate. Investors are required to be educated on the need and method of investment. It is also to be noticed that the investors are financially not literate to understand the intricacies of the business. It is also true that every person money by investing in small amounts and expects more return due to short span of time. It is where; the corporate bodies' takes added advantage on this area and try to deceive the investors. We also required

[58] Ibid para 53
[59] See. Sec.12 A SEBI Act, 1992

strengthening enforcement mechanisms for preventions of securities fraud in market and protect the interest of investors. Financial literacy to investor protects from prevention of market abuse and securities fraud.

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